FILED
JUN 22 1981
ALEXANDER L. STEVAS,

80-2173
No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

NORMAN M. LIPMAN,
Petitioner,

v.

WILLIAM M. LEECH, JR.,
ATTORNEY GENERAL AND REPORTER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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June 1981

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the due process and equal protection components of the Fourteenth Amendment to the Constitution of the United States bar the State of Tennessee from conferring upon its litigation counsel the exclusive power to summon witnesses before him for secret interrogation and production of documents.*

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* Petitioner herein was an appellee in the Supreme Court of Tennessee, as was Thomas H. Shriver, District Attorney General for Davidson County, appearing on relation of the State of Tennessee. Respondent herein was the sole appellant in the Supreme Court of Tennessee.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	13
A. The Due Process Clause of the Fourteenth Amendment, with exceptions not here pertinent, mandates that discovery "be a two-way street". *Wardius v. Oregon*, 412 U.S. 470, 475 (1973). The court below, in upholding the awesome secret discovery procedures made available under the challenged statute exclusively to the State of Tennessee, decided an important federal question in conflict with an applicable decision of this Court	15
B. The State may not, consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily create a favored class of litigants. *Kentucky Finance Co. v. Paramount Auto Exchange*, 262 U.S. 544, 551 (1923). The court below, in upholding the secret discovery procedures made available under the challenged statute to the State of Tennessee and withheld from its adversaries, decided an important federal question in conflict with an applicable decision of this Court	23
CONCLUSION	24

TABLE OF AUTHORITIES

CASES: Page

Escobedo v. Illinois, 378 U.S. 488 (1964) 20, 21
Kastigar v. United States, 406 U.S. 441 (1972) 19
Kentucky Finance Corp. v. Paramount Auto Exchange, 262 U.S. 544 (1923) 13, 23
Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946) 19, 21
Simons v. Bellinger, 644 F.2d 774 (D.C. Cir. 1980) 20
United States v. Doss, 563 F.2d 265 (6th Cir. 1977) (*en banc*) 22
United States v. Morton Salt Co., 338 U.S. 632 (1950) 22
Wardius v. Oregon, 412 U.S. 470 (1973) 13, 15

CONSTITUTIONS:

U.S. Const. Amend. XIV, Section 1 ..... *passim*

STATUTES:

28 U.S.C. § 1257(3) 2
Fed. R. Civ. 8(a) 23
Fed. R. Civ. P. 26(c) 17
Fed. R. Civ. P. 27(a) 18
Fed. R. Civ. P. 30(b)(1) 17
Fed. R. Civ. P. 30(d) 17
Tenn. Code Ann. § 8-6-102 ..... 4, 13
Tenn. Code Ann. §§ 8-6-109, 110 14
Tenn. Code Ann. § 8-6-401 ..... 2, 14, 20, 23
Tenn. Code Ann. § 8-6-402 ..... 2, 14, 20
Tenn. Code Ann. § 8-6-403 ..... 2, 3
Tenn. Code Ann. § 8-6-404 ..... 2, 3, 14
Tenn. Code Ann. § 8-6-405 ..... 2, 3
Tenn. Code Ann. § 8-6-406 ..... 2, 4
Tenn. Code Ann. § 8-6-407 17
Tenn. Code Ann. § 8-7-103 14
Tenn. Code Ann. § 10-7-504(d) 17
Tenn. Code Ann. § 47-18-108 14
Tenn. Code Ann. § 53-4505 14

TABLE OF AUTHORITIES—Continued

	Page
Tenn. Code Ann. § 58-1543	14
Tenn. R. Civ. P. 8.01	24
Tenn. R. Civ. P. 12.02(6)	6
Tenn. R. Civ. P. 26.03	17
Tenn. R. Civ. P. 27.01	18
Tenn. R. Civ. P. 30.02(1)	17
Tenn. R. Civ. P. 30.04	17
Tenn. R. App. P. 4(d), (h)	8

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

Petitioner Norman M. Lipman respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Tennessee in the above entitled case.

OPINIONS BELOW

The opinion of the Supreme Court of Tennessee is reported at 612 S.W.2d 454 (1981) and reprinted in the Appendix at pp. 1a-15a. The opinion of the Court of Appeals of Tennessee and the final judgments and opinions issued by the Chancery Court of Davidson County reviewed below are unreported; they are reprinted in the Appendix at pp. 16a-34a and 35a-56a, respectively.

JURISDICTION

The opinion of the Supreme Court of Tennessee was rendered on February 2, 1981 and the judgment of that Court was entered on the same date. (App. 57a) Thereafter, a timely petition for rehearing was denied on March 9, 1981. (App. 59a) A timely application for ex-

tension of time to file this petition was filed on June 3, 1981 and granted by Justice Stewart by Order of that same date. This petition is filed within the time allowed in that Order. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS INVOLVED

The statutory scheme which Petitioner challenged below was enacted as Chapter 646 of the Tennessee Public Acts of 1976 and has been codified at Sections 8-6-401 through 8-6-406 of the Tennessee Code Annotated. Those provisions read as follows:

> 8-6-401. Authority to give oaths and require testimony.—The attorney general and reporter, in performing the duties of his office where the state of Tennessee is a party litigant or there is reasonable cause to indicate it will be a party litigant is hereby empowered to require any person to testify under oath as to any matter which is a proper subject of inquiry by the attorney general and reporter. The attorney general and reporter or his designees are authorized to administer all necessary oaths. [Acts 1976 (Adj. S.), ch. 646, § 1, T.C.A., § 8-630.]
>
> 8-6-402. Investigative demands for production of documents and testimony.—For these purposes, the attorney general and reporter is empowered to issue civil investigative demands to require the attendance of witnesses or the submission of documents, or both, at specified times and places, to give testimony in the case or matter therein stated, mentioning the parties to the inquiry and the party at whose instance he is called, and, if necessary, requiring him to also bring with him any books, documents, or other writings, records or tangible objects under his control, which may be pertinent to the inquiry. No witness called to testify or to produce records, books, documents, writings or other tangible objects under §§ 8-6-401—

8-6-406, shall be required to testify in any county other than his county of residence or the county where the records or tangible objects are found under the witness' control. [Acts 1976 (Adj. S.), ch. 646, § 2; T.C.A., § 8-631.]

8-6-403. Service of Investigative demand.—Service of such civil investigation demand shall be had by a designated representative of the attorney general and reporter handing a copy of the demand to such witness, or if the witness cannot be found, then by leaving a copy of the demand at the residence or usual place of business of the witness. Such process shall run throughout the state but shall not require any witness to testify in any county other than his county of residence or the county where records or tangible objects demanded are found under the witness' control. [Acts 1976 (Adj. S.), ch. 646, § 3; T.C.A., § 8-632.]

8-6-404. Failure to comply with investigative demand.—Failure of any witness to comply with the terms of a civil investigative demand shall be certified to the chancery court of the chancery division in which the witness resides, and such chancery court shall exercise the authority granted it by law in the treating of contempt of court matters, including but not limited to those powers granted in §§ 23-903—23-905; all to the end that the witness shall be compelled to appear to give testimony at the time and place specified by the chancery court [Acts 1976 (Adj. S.), ch. 646, § 4; T.C.A., § 8-633.]

8-6-405. Penalty for failure to testify when served with investigative demand.—Any witness who appears as directed by the civil investigative demand, but upon appearance refuses to testify on matters not privileged by law, shall be punished as prescribed in § 8-6-404 hereof. [Acts 1976 (Adj. S.), ch. 646, § 5; T.C.A., § 8-634.]

> 8-6-406. Witness fees and mileage on investigative demands.—Any witness served with a civil investigative demand shall be paid fees and mileage on the same basis as are authorized to be paid witnesses in the courts of this state. [Acts 1976 (Adj. S.), ch. 646, § 6; T.C.A., § 8-635.]

Petitioner has drawn into question the validity of the foregoing statutory scheme on the ground of its repugnancy to Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner is the president of an incorporated association of proprietorships, partnerships, and corporations engaged in the wholesale distribution of alcoholic beverages in the State of Tennessee known as the Licensed Beverage Wholesalers of Tennessee, Inc.[1] Respondent is the Attorney General and Reporter of the State of Tennessee. As such, he is the executive head of the legal department of the State. Tenn. Code Ann. § 8-6-102.

Petitioner was served on February 20, 1979 with a document styled "Civil Investigative Demand" (herein-

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[1] At the time the proceedings below were initiated, the association was known as the Wine & Spirits Wholesalers of Tennessee, Inc.

after "CID") returnable some four weeks later,[2] directing him to appear before Respondent, or Respondent's designee, to give testimony and produce documents described in an attachment thereto. The CID and its attachments appear at pp. 69a-84a of the Appendix. Under cover of a letter dated March 2, 1979, Respondent's subordinate mailed "Supplemental Instructions for Attachment 1 of the Civil Investigative Demand" to Petitioner, outlining the timing and manner of document production. These Supplemental Instructions and the transmittal letter appear at pp. 85a-88a of the Appendix.

Petitioner commenced an action in the Chancery Court for Davidson County, Tennessee on May 9, 1979, seeking declaratory and injunctive relief against enforcement of the CID.[3] Petitioner's verified Chancery Court complaint (reproduced at pp. 60a-68a of the Appendix) challenged the CID and its underlying statute on a number of state and federal grounds including the following:

> "11. The statute which purports to authorize the Attorney General and Reporter to issue civil investigative demands . . . is unconstitutional, null, void, and of no force or effect for the following reasons:
>
> "a. * * * *
>
> "b. The statute classifies litigants and potential litigants in the courts of this state and confers upon the Attorney General an unreasonable favored litigant status . . . in violation of the Fourteenth Amendment to the United States Constitution." (App. 62a, 63a)

Upon commencement of the action, the Chancellor issued an order temporarily restraining Respondent from issu-

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[2] By agreement of counsel, the return date had been adjourned to 10:00 a.m. on May 9, 1979.

[3] The Honorable Thomas H. Shriver, District Attorney General for Davidson County, suing on relation of the State of Tennessee, joined as a plaintiff in the case, asserting a claim for relief in the nature of *quo warranto*.

ing, executing, or enforcing any CID's pending a preliminary injunction hearing. (App. 96a)

Prior to the date set for hearing on the request for preliminary injunctive relief, Respondent moved, pursuant to Rule 12.02(6) of the Tennessee Rules of Civil Procedure, to dismiss Petitioner's action for failure to state a claim upon which relief could be granted, contending that the enabling legislation was constitutional and the CID in question was proper as a matter of law. Following briefing[4] and oral argument the Chancellor issued his memorandum opinion on June 21, 1979 passing on Petitioner's Fourteenth Amendment challenge as follows:

> *Non-Reciprocal Discovery*
>
> "Plaintiffs' next allegation is that civil investigative demand statute constitute [sic] nonreciprocal discovery which violates the equal protection and due process clauses of the state and federal constitutions. They cite *Wardius* v. *Oregon*, 412 U.S. 470, 93 S.Ct. 2208 (1973) in support of that proposition. The Court finds that case distinguishable. At *Wardius*' criminal trial, a witness' alibi evidence was struck and *Wardius* was not permitted to testify regarding his alibi as a sanction for his failure to file a notice of alibi in accordance with an Oregon statute which provided that a defendant must give notice five days prior to trial of an alibi defense or he was precluded from relying upon it. There was no provision in the statute that the prosecution give notice of any rebuttal of such defense. The Court found it a violation of due process and 'fundamentally unfair to require the defendant to divulge the details of his own case while at the same time subjected him to the hazard

[4] The federal questions sought to be reviewed by this Court were treated in the briefs filed by Petitioner and Respondent in the Chancery Court. Pertinent extracts therefrom appear at pp. 103a-107a and pp. 100a-102a of the Appendix, respectively.

of surprise concerning refutation of the very pieces of evidence which he discloses to the State.' 93 S.Ct. at 2213.

"T.C.A. § 8-636 provides that materials obtained by the attorney general in the course of proceedings under the CID statutes may be used in legal proceedings. However, this is not the type of use to which the Court spoke in the *Wardius* case. *Wardius* dealt with substantive evidence offered at trial. It is this Court's conclusion that the fruits of precomplaint investigations conducted under the civil investigative demand statute may not be introduced as substantive evidence in the subsequent litigation, but rather must be confined to uses such as impeachment. Once litigation has been initiated, the recipient of a civil investigative demand would be entitled to fully reciprocal discovery under the Tennessee Rules of Civil Procedure." (App. 49a-50a)

Thereafter, on cross-motions for reconsideration, the Chancellor held that certain materials obtained by the Attorney General could be used as substantive evidence in subsequent litigation—

Reciprocal Discovery

"The defendant seeks reconsideration of the Court's ruling regarding reciprocal discovery. The Court has given further consideration to that portion of the opinion, and concludes that evidence which results from the issuance of the CID should be dealt with in the following manner. A distinction should be drawn between documentary evidence and that acquired through oral testimony. Documents obtained by the Attorney General do not become admissible in subsequent litigation as substantive evidence merely by virtue of their status as having been obtained pursuant to a CID; neither do they become inadmissible for any purpose solely because they have been so obtained, although they may be inadmissible for other

reasons. However, oral testimony obtained pursuant to a CID will only be admissible for such purposes as impeachment, and will not be admissible as substantive evidence in subsequent litigation." (Memorandum of July 12, 1979, at p. 4; App. 40a)

The Chancellor entered a final judgment, dismissing the action, on July 20, 1979. (App. 35a-37a) Petitioner duly perfected an appeal to the Court of Appeals of Tennessee by filing a Notice of Appeal in the Chancery Court on August 17, 1979. Among the issues presented for appellate review was the following:

"I. A. * * * * *

"C. *Whether the Secret, Non-Reciprocal Discovery Sought by the Attorney General Violates the Due Process and Equal Protection Clauses of the State and Federal Constitutions.*" (Brief for Appellant at p. 2; App. 109a)[5]

The intermediate appellate court resolved that issue in Petitioner's favor—

"The express purpose of the Statute is to grant to the attorney for the State of Tennesse an awesome power not granted to the attorney for any other litigant or prospective litigant who appears or expects to appear before the courts of this state. It should be emphasized that the power is not conferred upon a state official to be used for the general public good, but is effective only when the State is or expects to be a party to civil litigation. The attorney for the State is authorized to make an ex parte judicial determination favorable to himself and his clients that:

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[5] Tennessee has adopted a simplified appellate process similar to that of the federal courts; writs of error and assignments of error have been abolished. *See* Tenn. R. App. P. 4(d), (h). The federal questions sought to be reviewed were raised and preserved in the Court of Appeals by means of the above-quoted Statement of Issues and at pp. 21-24 of the body of the opening brief.

(a) The State (including its officers and agencies) is a party litigant (to a suit as plaintiff or defendant) or,

(b) 'There is reasonable cause to indicate' that the State (its officers or agencies) will be a party litigant (as plaintiff or defendant at any undefined future time in any type of lawsuit whatsoever in any court whatsoever).

"Upon making such determination, the Attorney General is authorized to require any person (whomsoever) (without any prior determination of reasonable cause to believe that such person actually has or probably has information pertinent to the pending or anticipated litigation) to appear to give testimony and produce documents; but the authority before whom the citizen is to appear is not designated in the act. Upon failure of the recipient to comply with such requirement, the act provides that the Chancery Court *shall* exercise its authority in the treatment of contempt matters: all to the end that the government, litigating with one of its citizens in one of its courts, may have an unequal and unfair advantage in preparation for trial.

"Such favored treatment of one party to litigation without equivalent opportunity to the other party is contrary to even handed justice. See *People* v. *Anaconda Wire and Cable Co.*, 265 N.Y.S. 2d 121 (1965).

"Due process requires reciprocal discovery. *Wardius* v. *Oregon*, 412 U.S. 470, 93 S.Ct. 2208 (1973). Non reciprocal discovery may be justified only by strong showing of special public interest. Special public interest is not the interest of the State government in the result of litigation to which it is a party. Special public interest involves an area of activity which affects the public safety, health, welfare or morals to the extent of justifying governmental regulations or restraint of the activity. By definition, *special* public interest cannot apply to all

aspects of private life. The act under discussion allows discovery in any area of life so long as it is useful in real or probable litigation of the State.

"In 81A, C.J.S., States, § 374, pp. 994-995 is found the following text:

> 'On entering the Courts as a litigant, the state is bound by the general rules of practice and procedure established by the courts in the discharge of their duties, even though the state sues in its sovereign, as contradistinguished from its proprietary capacity. When the state invokes the aid of the Courts, it must submit to the application of the same principles which govern private suitors, and by bringing an action the state subjects itself to the procedure established for its final and complete disposition in the courts, by way of appeal or otherwise.'

In the view of this Court, a statute such as the one under review, which purports to create a special advantage to the State as a litigant in the courts by granting to the attorney for the State an unlimited power of pre trial discovery, which power is not granted to the adversaries of the State in its litigation, is a denial of equal protection under the law (U.S. Constitution, Amendment 14) (Constitution of Tennessee, Article I, Section 17)." (Court of Appeals of Tennessee opinion dated March 28, 1980 at pp. 7-9; App. 24a-26a)

On application by Respondent, the Supreme Court of Tennessee granted permission to appeal on May 19, 1980.[6] The Fourteenth Amendment questions sought to be re-

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[6] In Respondent's Application for Appeal by Permission included as one of the issues presented for review was "[w]hether the Civil Investigative Demand Statutes that grant precomplaint investigatory power to the State through its Attorney General violate the appellee Lipman's state or federal constitutional rights" (App. 115a).

viewed here were briefed by the parties[7] and squarely passed upon by the Supreme Court of Tennessee—

> The Court of Appeals held that the statutes authorizing the issuance of a Civil Investigative Demand are violative of the due process and equal protection provisions of the state and federal constitutions in that they create a special advantage to the State as a litigant in the courts by granting to the attorney for the State an unlimited power of pre trial discovery which power is not granted to the adversaries of the State in its litigation . . . citing *Wardius* v. *Oregon*, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973). *Wardius* was an adjudicatory proceeding—a trial of a criminal offense. The defendant was required by statute to give notice of his intent to rely on an alibi defense and to reveal the names of witnesses to be called to establish the alibi, on penalty of being denied the privilege of asserting the defense. The state was not required to reciprocate by giving the defendant the names of witnesses it intended to call to rebut the alibi evidence. The court held that reciprocal discovery is required by fundamental fairness; and, in the absence of fair notice that the defendant would have an opportunity to discover the state's rebuttal witnesses, defendant cannot, consistently with due process requirements, be required to reveal his alibi defense.
>
> We are of the opinion the CID statutes comport with the fundamental fairness requirement voiced in *Wardius, supra.* A CID can be issued by the attorney general and reporter only in two circumstances —one where the state is a party litigant, the other

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[7] Pertinent extracts from Respondent's opening brief (App. 116a-125a) and reply brief (App. 136a-139a) below and from Petitioner's brief below (App. 126a-135a) are included in the Appendix hereto to show the manner in which the federal questions sought to be reviewed were raised and preserved in the Supreme Court of Tennessee.

where there is reasonable cause to indicate the state will be a party litigant. Where the state is a party litigant, adversaries of the state are afforded a procedure for pretrial discovery. *See* Rules 26 through 37 of the Tennessee Rules of Civil Procedure. In those instances where there is reasonable cause to indicate that the state will be a party litigant, the CID is an investigatory proceeding, not an adjudicatory proceeding as in *Wardius, supra.* The purpose of an investigatory proceeding "is to discover and produce evidence not to prove a pending charge or complaint, but upon which to make one if, in the [agency's] judgment, the facts thus discovered should justify doing so." *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 201, 66 S.Ct. 494, 501, 90 L.Ed. 614 (1946).

In *Genuine Parts Company* v. *F.T.C.*, 445 F.2d 1382, 1388 (5th Cir. 1971), it is pointed out that:

> A party under investigation may not contest the discovery and production of evidence in the same manner he may contest the use of that evidence in an adjudication by proper objection, by the introduction of other evidence, and the other safeguards traditional to an adversary proceeding under our system. An investigation does not determine guilt or innocence; that is done at the adjudication, and thus it is there the whole plethora of due process rights designed to insure the fairness of such a determination come to bear.

See also, Hannah v. *Larche*, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960).

The advantage, if any, conferred upon the state by having the statutory right to pre-complaint discovery is minimal and is negated upon commencement of an adjudicatory proceeding by the fact that the state's adversary then has full discovery rights. (612 S.W.2d at 457-58; App. 6a-8a)

Petitioner timely sought rehearing in the Supreme Court of Tennessee. The petition for rehearing was denied without opinion on March 9, 1981. (App. 59a)

REASONS FOR GRANTING THE WRIT

The secret, non-reciprocal process granted to the Attorney General of Tennessee by the Tennessee Civil Investigative Demand statute is not simply an investigatory tool, but is a discovery device available at every phase of anticipated and pending litigation involving the State of Tennessee. It affords the state a special advantage over its less favored adversaries in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Supreme Court of Tennessee, upholding that statute in the face of a challenge to its constitutionality, decided a fundamental federal question under the Due Process Clause in conflict with the reciprocal discovery principles announced by this Court in *Wardius* v. *Oregon*, 412 U.S. 470 (1973). The lack of constitutionally valid justification for the disparity in discovery power afforded the Attorney General as litigant, a power denied to Petitioner as either a target of planned litigation or actual party litigant, violates the Equal Protection Clause as well. *Kentucky Finance Corp.* v. *Paramount Auto Exchange*, 262 U.S. 544 (1923).

Respondent, as Attorney General and Reporter of the State of Tennessee, is the executive head of the legal department of State government. Tenn. Code Ann. § 8-6-102. As such, he is the State's principal litigation counsel, charged with broad discretionary power to represent the State and its agencies in prosecution and defense of civil and certain criminal matters in both state and federal courts and to defend the constitutionality of all legisla-

tion of statewide applicability. Tenn. Code Ann. §§ 8-6-109 and 110.[8]

The Tennessee Civil Investigative Demand statute additionally confers upon Respondent what the Supreme Court of Tennessee accurately described as "the awesome power" to issue compulsory process (612 S.W.2d at 456; App. 4a.):

> "The attorney general and reporter, in performing the duties of his office where the state of Tennessee is a party litigant or there is reasonable cause to indicate it will be a party litigant is hereby empowered to require any person to testify under oath as to any matter which is a proper subject of inquiry by the attorney general and reporter." (Tenn. Code Ann. § 8-6-401)

In the exercise of those powers, Respondent may "require the attendance of witnesses or the submission of documents, or both." Tenn. Code Ann. § 8-6-402.

CID's are not merely precatory appeals to civic duty, for any refusal to comply with a demand

> "Shall be certified to the chancery court . . . and such chancery court *shall* exercise the authority granted it by law in the treating of contempt of court matters . . . all to the end that the witness shall be compelled to appear to give testimony . . ." (Tenn. Code Ann. § 8-6-404) (emphasis supplied)

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[8] Representation of the State in criminal matters at the trial level is generally reserved to the elected District Attorneys General of the several judicial districts of the State. *See* Tenn. Code Ann. § 8-7-103. There are, however, a number of specific statutes giving concurrent power to the Attorney General and the local district attorney to enforce particular provisions of State law. *See, e.g.*, Tenn. Code Ann. § 47-18-108 (prosecutions under the Consumer Protection Act); Tenn. Code Ann. § 53-4505 (prosecutions under the Sanitary Landfill Areas Act); Tenn. Code Ann. § 58-1543 (prosecutions under the Surface Mining Act).

A. The Due Process Clause of the Fourteenth Amendment, with exceptions not here pertinent, mandates that discovery "be a two-way street". *Wardius* v. *Oregon*, 412 U.S. 470, 475 (1973). The court below, in upholding the awesome secret discovery procedures made available under the challenged statute exclusively to the State of Tennessee, decided an important federal question in conflict with an applicable decision of this Court.

The contrasts between Respondent's unilateral CID powers and normal pre- and post-complaint reciprocal discovery procedures with their attendant protective features show the challenged statute to be an anathema to the adversary system of justice. Respondent, having chosen his opponents and selected the issues to be litigated, wields the unlimited power to build his case in secret under aegis of judicial contempt powers. The conflict between that power and due process principles established by this Court is the source of the due process issue here addressed.

In *Wardius* v. *Oregon*, 412 U.S. 470 (1373), this Court declared constitutionally infirm a rule which required criminal defendants to disclose the names of their alibi witnesses, but imposed no corresponding obligation on the State to identify its rebuttal witnesses. Noting that due process did not require the State to adopt any discovery procedures, this Court held "that in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street." *Id.* at 475.[9]

Petitioner will show that discovery under the challenged statute is a decidedly one-way street, reserved exclusively

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[9] Moreover, although the amount of discovery available to the parties is not generally of constitutional concern, "[t]his Court . . . has been particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial." *Id.* at 474 n.6 (citations omitted).

to Respondent, contrary to the teachings of *Wardius*. The Supreme Court of Tennessee ruled, however, that due process was not offended by this disparity in discovery—

> "We are of the opinion the CID statutes comport with the fundamental fairness requirement voiced in *Wardius, supra*. A CID can be issued by the attorney general and reporter only in two circumstances—one where the state is a party litigant, the other where there is reasonable cause to indicate the state will be a party litigant. Where the state is a party litigant, adversaries of the state are afforded a procedure for pretrial discovery. *See* Rules 26 through 37 of the Tennessee Rules of Civil Procedure. In those instances where there is reasonable cause to indicate that the state will be a party litigant, the CID is an investigatory proceeding, not an adjudicatory proceeding as in *Wardius, supra*. The purpose of an investigatory proceeding 'is to discover and produce evidence not to prove a pending charge or complaint, but upon which to make one if, in the [agency's] judgment, the facts thus discovered should justify doing so." *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 201, 66 S.Ct. 494, 501, 90 L.Ed. 614 (1946).
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> "The advantage, if any, conferred upon the state by having the statutory right to pre-complaint discovery is minimal and is negated upon commencement of an adjudicatory proceeding by the fact that the state's adversary then has full discovery rights." (612 S.W.2d at 457-58; App. 7a-8a) (Citations omitted).

This reasoning will not withstand critical analysis.

The availability of mutual discovery procedures upon commencement of adjudicatory proceedings cures neither the disparity in pre-complaint use of CID powers dis-

cussed below nor the advantage the Attorney General enjoys post-complaint as he continues to build his case in secret. Certainly, once litigation is pending both the State and its adversary may conduct mutual discovery under the applicable rules of civil procedure. The State has given its litigation counsel, however, additional discovery powers not available to opposing counsel, additional powers markedly different from those available under the rules of civil procedure. Most notably, in CID proceedings the parties engaged in the underlying litigation with the State are not permitted to attend. There is no opportunity to cross-examine or make appropriate objections. *Compare with* Fed.R.Civ. P. 30(b)(1); Tenn.R.Civ.P. 30.02(1). The State's adversaries have no way of protecting trade secret information in the hands of the witness or asserting any privilege which the witness may be unwilling or unable to interpose or of which the witness may be ignorant. *Compare with* Fed.R.Civ.P. 30(d); Tenn.R.Civ.P. 30.04. Finally, the usual course of discovery is always subject to the powers of the court in which the action is pending to "protect a party . . . from annoyance, embarrassment, oppression, or undue burden or expense." Fed.R.Civ.P. 26(c); Tenn.R.Civ.P. 26.03. The secret inquisition under the challenged statute, however, proceeds at the unfettered whim of the interrogator. Thus, the State's attorney is uniquely privileged to engage in compelled, secret discovery in his preparation for trial. Although his adversary might be able to ultimately discovery some of the fruits of such a probe, the ability to do so is not clear in light of statutes limiting information disclosures by the Attorney General. Tenn. Code Ann. §§ 8-6-407, 10-7-504(d). In short, the post-complaint discovery exclusively available to Respondent bestows upon him a fundamentally unfair litigation advantage, subjecting Petitioner to a form of "trial by ambush" in violation of due process principles recognized by this Court.

Pre-complaint use of CID power exposes potential adversaries of the State to even greater risk of irretrievable loss of the right to a fair trial. Quite apart from his post-complaint privileges and powers, the CID statute grants the State's attorney compulsory process to conduct a unilateral, totally secret and wholly unlimited probe into "contemplated" litigation. The State's targeted adversaries, by comparison, have no means of compelling discovery prior to commencement of litigation, save in exceptional circumstances. Fed.R.Civ.P. 27(a); Tenn.R.Civ. P. 27.01. The State of Tennessee has arrogated to its trial counsel the unfettered and exclusive power to buttress the State's claim or defense before the adjudicatory process has been formally instituted.

At the pre-complaint stage, adverse parties are not even aware that Respondent is likely to bring suit on behalf of the State, much less the specific charges being contemplated by the Respondent. The State "pre-discovers" its case under powers of compulsory process, without affording the targeted adversary notice or opportunity to appear or cross-examine. This "pre-discovery" also enables Respondent to solidify witnesses' testimony under court compulsion even before suit is commenced, foreclosing meaningful contemporaneous cross-examination. While Respondent is compelling testimony and examining documents in secret, his target must be endowed with extraordinary powers of precognition in order to even be aware of a need to interview such witnesses and assemble such documentary proof as may be available to them without benefit of compulsory legal process. Thus, the State's adversary may be forced to begin its trial preparation at a time after the Respondent has focused upon it as a target, undertaken extensive, if not complete, discovery and can immediately employ the fruits thereof to his tactical advantage. Moreover, no limitation is statutorily placed upon the use of the fruits of such a probe. Even

if testimony compelled under the statute is not itself useable at trial, it is clear that evidence to be revealed by Respondent for the first time at trial may be derived from leads obtained through CID efforts unknown to the targeted adversary. *See, e.g., Kastigar* v. *United States*, 406 U.S. 441, 459-61 (1972).[10]

The Supreme Court of Tennessee erroneously found no constitutional deficiencies in this extraordinarily imbalanced procedure, declaring that pre-complaint advantages gained by the State were negated by subsequent mutual discovery and labelling the pre-complaint use of a CID as merely "an investigatory proceeding" to which no due process rights attach. 612 S.W.2d at 475; App. 7a, *citing Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1974).[11] As previously noted, pre-complaint advantages enjoyed by the Attorney General are not negated by post-complaint utilization of mutual discovery procedures. The characterization of pre-complaint use of a CID as part of "an investigatory proceeding" squares neither with the explicit provisions of the challenged statute, nor with other decisions of this Court in similar contexts.

Although never addressed by this Court in the civil litigation context, this Court has recognized in other contexts that the line between "investigatory" and "accusatory" stages is not drawn at the time of mere issuance of formal papers. The governmental process shifts from "investigatory" to "accusatory" when the investigation

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[10] Recognizing the multifarious and subtle ways in which testimony could be indirectly used, this Court imposed upon the government the "heavy burden" of negating use by affirmative proof that the trial "evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Id.* at 460.

[11] The court below borrows heavily from precedent sustaining administrative subpoenas. *See* 612 S.W.2d at 457-58; App. 7a. However, Respondent is litigation counsel for the State, not an administrative agency charged with interpreting and enforcing a narrow regulatory scheme.

focuses upon a particular target. At that point the adversary system begins to operate and constitutional rights attach. *Escobedo* v. *Illinois*, 378 U.S. 478, 485-486 (1964)[12] Attachment of constitutional rights at that stage is crucial, for occurrences at that stage could "affect the whole trial" since rights may be "irretrievably lost, if not then and there asserted . . . ." Absent such protections the trial may become "no more than an appeal from the interrogation . . . ." *Id.* at 486, 487.

The central feature of Tennessee's statutory scheme mandates the pre-existence of a concrete adversary relationship between the State and others—the State of Tennessee must be a "party litigant" or there must be "reasonable cause to indicate it will be" a party litigant. Tenn. Code Ann. § 8-6-401. The parties and issues implicated in this adversary relationship must also be crystalized, for Respondent is obliged to specify in the demand the "case or matter" involved and identify "the parties to the inquiry." Tenn. Code Ann. § 8-6-402.[13] The statute thus mandates that issuance of a pre-complaint CID must

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[12] The Court of Appeals for the District of Columbia recently observed:

> At some point, the prosecutor's inquiry becomes sufficiently focused so that he is preparing a case against a particular defendant rather than seeking a defendant against whom he may prepare a case. At this point his efforts become advocatory: They are intimately associated with the sensitive decision of whether or not to initiate a particular prosecution, a decision which is left to advocates, not investigators. That point marks the critical event entitling him to absolute rather than qualified immunity from civil liability arising out of his subsequent actions. *Simons* v. *Bellinger*, 644 F.2d 774 (D.C. Cir. 1980).

[13] The court below held that the particular demand issued in this case was invalid for failure to comply with these statutory requirements and for failure to have been issued by Respondent personally. *See* 612 S.W.2d at 456; App. 2a.

await the completion of informal, noncompulsory, investigative activities sufficient to give Respondent reasonable cause to believe that the State of Tennessee will be involved in litigation with identified parties concerning particular matters. At that juncture the formality of a summons and complaint is just that—a mere formality.

The likelihood of irretrievable loss of the right to a fair adversary proceeding, which was of concern in *Escobedo*, is similarly implicated in civil cases where pre-complaint use of a CID results in the taking of testimony and production of documents in the Attorney General's chambers while opposing counsel are excluded. Due process protections forbid the State's circumvention of the adversary system by bestowing solely upon its litigation counsel the pre-complaint power to forcibly assemble its case in secret.

The statute at issue here is markedly different from that before this Court in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946), upon which the court below relied.[14] As this Court pointed out, under that statutory scheme "Congress has made no requirements in terms of showing of 'probable cause' . . . . [T]he Administrator's . . . investigative function, in searching out violations with a view to securing enforcement of the

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[14] The enabling legislation involved in *Oklahoma Press* provided, in pertinent part,

> "The administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act." *Id.* at 199 n.23.

Act, is essentially the same as the grand jury's . . . ." *Id.* at 215-16 (footnote omitted). *Accord, e.g., United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-43 (1950) (Administrative agency's power of investigation "analogous to the Grand Jury, which . . . can investigate merely on suspicion that the law is being violated or even just because it wants assurance that it is not.") The grand jury analogy is particularly pertinent to the instant case, for due process forbids the use of grand jury process once the grand jury has found probable cause and handed down its indictment. *E.g., United States* v. *Doss*, 563 F.2d 265, 275-76 (6th Cir. 1977) (*en banc*), and cases cited therein. Similarly, the State may not constitutionally empower its litigation counsel to employ nonreciprocal compulsory discovery techniques after he has "reasonable cause to indicate that [the State] will be a party litigant."

Since it found no due process rights implicated in the challenged statute, the court below made no effort to identify any state interests which justified the disparate treatment of litigants. Petitioner will argue in this Court that no such interests can be found. CID's issued under the challenged statute are not confined to enforcement of any particular regulatory scheme partaking of a public interest—they may range from a simple collision involving a state-owned automobile to the most complicated securities transaction. Respondent may compel the secret production of testimonial and documentary evidence in preparation for trial. No rational basis justifies the substantial litigation advantage which the State has conferred upon its litigation counsel.

B. The State may not, consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily create a favored class of litigants. *Kentucky Finance Co.* v. *Paramount Auto Exchange*, 262 U.S. 544, 551 (1923). The court below, in upholding the secret discovery procedures made available under the challenged statute to the State of Tennessee and withheld from its adversaries, decided an important federal question in conflict with an applicable decision of this Court.

Quite apart from its deprivation of due process, the challenged statute denies equal protection of the laws by creating "favored" and "disfavored" classes of litigants. The State may not arbitrarily favor one class of litigants over another or impose on one class of litigants burdens not imposed on others. *E.g.*, *Kentucky Finance Corp.* v. *Paramount Auto Exchange*, 262 U.S. 544, 551 (1923). By conferring on its litigation counsel the exclusive right to conduct secret, nonreciprocal discovery, the State has radically departed from core concepts of even-handed justice.

As indicated above, there is no rational basis to support a distinction between the State of Tennessee as a litigant, and all other litigants. Even if one focuses exclusively upon the pre-complaint aspects of the challenged statute, it is clear that no legitimate state interest is rationally furthered by the statute. As the statutory predicate for issuing a CID, Respondent must have "reasonable cause to indicate that [the State] will be a party litigant" (Tenn. Code Ann. § 8-6-401) and, as held by the Court of Appeals and affirmed by the Supreme Court of Tennessee, "implementation [of the challenged statute] must be triggered by a decision of the Attorney General, himself, stating with particularity the grounds of his decision, the names of the parties to the . . . expected litigation, [and] the nature of the same . . . ." Slip op. at 13; App. 29a. Given the simplified notice-pleading rules which govern modern civil litigation (e.g., Fed. R.

Civ.P. 8(a); Tenn.R.Civ.P. 8.01), the information required to issue a CID is more than sufficient to frame a complaint and commence the judicial process. Respondent can have no reason to defer litigation or use a CID in lieu of mutual discovery procedures, save a desire to secure a tactical advantage over his opponents. Prevailing in litigation to which it is a party is not a legitimate interest which the State of Tennessee should constitutionally be permitted to further.

The extraordinary and awesome powers conferred by the State of Tennessee upon its litigation counsel to the exclusion of all other litigants does not comport with due process and equal protection of the law which the Fourteenth Amendment requires. A writ of certiorari should be issued to review the judgment of the Supreme Court of Tennessee which upheld the statute granting such power.

Respectfully submitted,

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June 1981

80-2173

Office-Supreme Court, U.S.
FILED
JUN 22 1981
ALEXANDER L. STEVAS,
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NORMAN M. LIPMAN,
Petitioner,

v.

WILLIAM M. LEECH, JR.,
ATTORNEY GENERAL AND REPORTER,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

APPENDIX

	Page
Opinion of the Supreme Court of Tennessee, filed February 2, 1981	1a
Opinion of the Court of Appeals of Tennessee, Middle Section, filed March 28, 1980	16a
Final Judgment of the Chancery Court of Davidson County, filed July 20, 1979	35a
Memorandum opinion of the Chancery Court of Davidson County, filed July 12, 1979	38a
Memorandum opinion of the Chancery Court of Davidson County, filed June 21, 1979	42a
Judgment of the Supreme Court of Tennessee, filed February 2, 1981	57a
Order of the Supreme Court of Tennessee, filed March 9, 1981, denying petition for rehearing	59a
Complaint, with exhibits, filed in the Chancery Court of Davidson County on May 4, 1979	60a
Restraining Order, entered by the Chancery Court of Davidson County on May 4, 1979	36a
Defendant's Amended Motion to Dismiss, filed in Chancery Court on May 11, 1979	98a
Extracts from Defendant's Amended Memorandum of Law in Support of Motion to Dismiss, filed in Chancery Court on May 11, 1979	100a
Extracts from the Plaintiffs Brief in Opposition to Defendant's Amended Motion to Dismiss, filed in Chancery Court on May 30, 1979	103a
Extracts from the Brief of Plaintiffs Appellants, filed in the Court of Appeals of Tennessee on October 25, 1979	108a
Extracts from Respondent's Application for an Appeal by Permission, filed in the Supreme Court of Tennessee on April 7, 1980	114a

Page

Extracts from the opening Brief for the Appellant, filed in the Supreme Court of Tennessee on June 23, 1980 ..... 116a

Extracts from the Brief of Appellees, filed in the Supreme Court of Tennessee on September 16, 1980.. 126a

Extracts from the Reply Brief on Behalf of the Appellant filed in the Supreme Court of Tennessee on October 3, 1980 ..... 136a

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

[Filed Feb. 2, 1981]

RECOMMENDED FOR PUBLICATION

STATE OF TENNESSEE, ex rel., THOMAS H. SHRIVER,
DISTRICT ATTORNEY GENERAL

and

NORMAN M. LIPMAN, PRESIDENT
WINE & SPIRITS WHOLESALERS OF TENNESSEE, INC.,
Plaintiffs-Appellants

vs.

WILLIAM M. LEECH, JR.
ATTORNEY GENERAL AND REPORTER,
Defendant-Appellee

DAVIDSON EQUITY

HON. C. ALLEN HIGH, CHANCELLOR
[Names of Counsel Omitted in Printing]

COOPER, JUSTICE

OPINION

This action in the nature of quo warranto and for declaratory and injunctive relief was filed in the Chancery Court of Davidson County challenging the authority and action of the Attorney General and Reporter of the State of Tennessee in issuing a "Civil Investigative Demand" directed to Norman M. Lipman, President, Wine & Spirits Wholesalers of Tennessee.[1] On considering a

[1] See appendix to the opinion for a copy of the CID issued.

motion to dismiss, which was treated as a motion for summary judgment since it was predicated in part on affidavits, the chancellor dismissed the quo warranto phase of the case. In the other phase the chancellor declared the Civil Investigative Demand statutes[2] to be constitutional and dismissed the complaint generally.

The Court of Appeals affirmed the chancellor's decree dismissing the action in the nature of quo warranto. As to the other phase, the Court of Appeals concluded that the Tennessee Civil Investigative Demand Statute violated the due process, equal protection and search and seizure provisions of the Tennessee and United States Constitutions. The court also concluded that even if the CID statute were constitutional, the CID issued in this case was invalid in that it failed in material ways to comply with the requirements of the statute. The Court of Appeals then reversed that part of the chancellor's decree which dismissed the complaint generally and remanded the cause to the trial court for further action.

We agree with the Court of Appeals that the CID served on Mr. Lipman is invalid, not on the basis that the statute granting authority to the Attorney General and Reporter to issue a CID is unconstitutional, but rather on the basis that the CID was not issued by the proper party. Neither does it set forth with sufficient particularity the matter under investigation nor identify the parties to the inquiry.

The Attorney General and Reporter of the State of Tennessee, in performing the duties of his office, is empowered to issue civil investigative demands requiring the attendance of witnesses or the submission of documents, or both, in matters "where the State of Tennessee is a party litigant or there is reasonable cause to indicate

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[2] T.C.A. §§ 8-6-401 et seq. The full text of the statute is set forth as an appendix to the opinion.

it will be a party litigant." T.C.A. §§ 8-6-401 and 402. The form and content of the CID is set forth in T.C.A. § 8-6-402. That section states that testimony and documents may be required "in the case or matter therein stated" and that "the parties to the inquiry" shall be identified.

The CID served on Mr. Lipman was not issued by the attorney general and reporter, but was issued over the signature of William J. Haynes, Deputy Attorney General, in furtherance of "The Antitrust Division's (of the attorney general's office) Investigation of the Tennessee Liquor Industry." The parties to the inquiry were not identified in the CID, except insofar as Mr. Lipman was directed to appear at the office of the attorney general and reporter and bring with him certain documents from the files of the Wine & Spirits Wholesalers of Tennessee, Inc.

By letter, counsel for the Wine and Spirits Wholesalers of Tennessee, Inc., requested that the attorney general and reporter identify the parties under investigation and describe the conduct and the alleged violations of law under investigation. The attorney general and reporter, through Deputy Attorney General Haynes, refused both requests, standing on the efficacy of the CID as issued.

As pointed out by counsel for Mr. Lipman, "There is a due process right to refuse unreasonable and irrelevant investigative demands. Oklahoma Press v. Walling, 327 U.S. 186, 208-209, 66 S.Ct. 494, 505-506 (1946); In re Gold Bond Stamp Co., 221 F. Supp. 391 (D. Minn. 1963), *aff'd* 325 F.2d 1018 (8th Cir. 1964); Lewandowski v. Danforth, 547 S.W.2d 470, 472-483; (Mo. 1977). To exercise this right, the recipient of a CID must be sufficiently informed of the conduct under investigation to allow a determination of the reasonableness and relevancy of demands for inspection. *See* Gold Bond, *supra*,

221 F. Supp. at 397, T.C.A. § 8-6-402 makes explicit the requirement of specification implied under due process principles. Pursuant to the statute, the attorney general must state in the CID the 'case' that is pending or the 'matter' under investigation. . . " The statute also requires that the CID identify the parties to the "case" or "investigation." None of these statutory requirements are met in the CID as issued.

Further, T.C.A. §§ 8-6-401 and 402 speak in terms of the attorney general and reporter issuing the CID. The debate in the House of Representatives on passage of the CID statute demonstrates that the legislators recognized the awesome power inherent in the use of a CID and that, if unbridled, the power could be abused. *See* Debate on House Bill 1728, February 25, 1976, House Tape #62.[3] The legislature limited the use of a CID to matters where the state is a party litigant or there is reasonable cause to indicate that the state will be a party litigant. The latter base of authority for the issuance of a CID—the determination of reasonable cause—requires the *exercise of considered* judgment which the legislature was content to permit the attorney general and reporter to exercise. As pointed out by the Court of Appeals, the power granted by the CID statute is of a quasi-judicial nature which should not be delegated absent express authority to do so.

The attorney general and reporter has cited us to T.C.A. § 8-6-103 for a general grant of authority to his deputies and assistants to exercise authority entrusted

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[3] "Representative McWilliams (one of the sponsors of the bill):

And this only to give it to one man, now. It gives it to the Attorney General of the State of Tennessee.

"Representative Hicks:

Well, I tell you I had hoped that when we framed these constitutions that we didn't make any king makers and I'm afraid that's what you're fixing to do."

to the attorney general and reporter in the performance of his duties. From this, he argues that his deputy has authority to issue a CID. We cannot accept this premise. First, it is contra to the language of the CID statute which grants the power to issue a CID to the attorney general and reporter. The same statute makes a grant of authority of a "designee" of the attorney general and reporter but limits it to the administering of "all necessary oaths." If the legislature had intended the general grant of authority under T.C.A. § 8-6-103 to control actions under the CID statute, the grant of authority to a "designee" would be superfluous. Then too, there is the legislative history where one of the sponsors of the CID statute indicated the grant of authority to issue a CID was to one man—the attorney general and reporter. Finally, the power that rests in the hands of the person authorized to issue a CID and its potential for abuse if not used properly demands that the CID be issued only by the person named in the statute, the attorney general, and not the multitude of deputies and assistants employed by him in the performance of the duties of his office. *Cf.* United States v. Giordano, 416 U.S. 505, 94 S.Ct. 1820 (1974); State v. Farha, 218 Kan. 394, 544 P.2d 341 (1975), cert. denied, 426 U.S. 949 (1976).

Normally a holding that the CID is invalid because of statutory deficiencies would terminate an action challenging the efficacy of the CID. However, since a CID that meets the material requirements of the CID statutes could be issued, we deem it necessary to consider appellee's challenge to the basic authority of the attorney general to investigate possible violations of the antitrust laws of the State of Tennessee, and the challenge to the constitutionality of the CID statutes.

Both the chancellor and Court of Appeals concluded the attorney general has the authority to investigate possible violations of the antitrust laws of the state. We

agree. Title 69, Chapter 1, T.C.A. forbids trusts, unlawful restraint of trade and discrimination. T.C.A. § 69-104 provides for forfeiture of charters and franchises of corporations violating T.C.A. §§ 61-101 and 103 and states:

> It is made the duty of the attorney general to enforce these provisions.

The duty to investigate possible antitrust violations has not been delegated to any other individual or agency of state government. It logically follows that the statutorily created responsibility imposed on the attorney general to enforce the antitrust laws includes the authority to investigate possible violations.

The Court of Appeals held that the statutes authorizing the isuance of a Civil Investigative Demand are violative of due process and equal protection provisions of the state and federal constitutions in that they "create a special advantage to the State as a litigant in the courts by granting to the attorney for the State an unlimited power of pre trial discovery which power is not granted to the adversaries of the State in its litigation. . ." citing Wardius v. Oregon, 412 U.S. 470, 93 S.Ct. 2208 (1973). *Wardius* was an adjudicatory proceeding—a trial of a criminal offense. The defendant was required by statute to give notice of his intent to rely on an alibi defense and to reveal the names of witnesses to be called to establish the alibi, on penalty of being denied the privilege of asserting the defense. The state was not required to reciprocate by giving the defendant the names of witnesses it intended to call to rebut the alibi evidence. The court held that reciprocal discovery is required by fundamental fairness; and, in the absence of fair notice that the defendant would have an opportunity to discover the state's rebuttal witnesses, defendant cannot, consistently with due process requirements, be required to reveal his alibi defense.

We are of the opinion the CID statutes comport with the fundamental fairness requirement voiced in *Wardius, supra.* A CID can be issued by the attorney general and reporter only in two circumstances—one where the state is a party litigant, the other where there is reasonable cause to indicate the state will be a party litigant. Where the state is a party litigant, adversaries of the state are afforded a procedure for pretrial discovery. *See* Rules 26 through 37 of the TENNESSEE RULES OF CIVIL PROCEDURE. In those instances where there is reasonable cause to indicate that the state will be a party litigant, the CID is an investigatory proceeding, not an adjudicatory proceeding as in *Wardius, supra.* The purpose of an investigatory proceeding "is to discover and produce evidence not to prove a pending charge or complaint, but upon which to make one if, in the [agency's] judgment, the facts thus discovered should justify doing so." Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 201, 66 S.Ct. 494, 501, 90 L.Ed. 614 (1946).

In Genuine Parts Company v. F.T.C. 445 F.2d 1382, 1388 (5th Cir. 1971), it is pointed out that:

> A party under investigation may not contest the discovery and production of evidence in the same manner he may contest the use of that evidence in an adjudication by proper objection, by the introduction of other evidence, and the other safeguards traditional to an adversary proceeding under our system. An investigation does not determine guilt or innocence; that is done at the adjudication, and thus it is there the whole plethora of due process rights designed to insure the fairness of such a determination come to bear.

See also, Hannah v. Larche, 363 U.S. 420, 808 S.Ct. 1502 (1960).

The advantage, if any, conferred upon the state by having the statutory right to pre-complaint discovery is

minimal and is negated upon commencement of an adjudicatory proceeding by the fact that the state's adversary then has full discovery rights.

The Court of Appeals also held that the compulsory taking of testimony and production of documents under the Tennessee CID statute was violative of the 4th Amendment to the Constitution of the United States and Article 1, Section 7 of the Tennessee Constitution. In reliance on Marshall v. Barlow's Inc., 436 U.S. 307, 98 S.Ct. 1816 (1978), the court determined that issuance of a CID required prior approval by a neutral and detached magistrate and reasoned that since the CID statute makes no provision for this judicial determination, it is unconstitutional. We do not agree, but are of the opinion that the CID issued in this case does not violate the constitutional prohibition against an unreasonable search and seizure.

In *Barlow's* the Court held that on-site searches under the civil enforcement provisions of the Occupational Safety and Health Act of 1970 are subject to the Fourth Amendment warrant requirement of the Constitution of the United States, and that the statutory authorization for warrantless on-site inspections is unconstitutional. The Court went on to note, however, that the reasonableness of warrantless investigations by other administrative agencies "will depend upon the specific enforcement needs and privacy guarantees of each statute" and that "the facts and law" of individual cases will control. 436 U.S. at 321-22, 98 S.Ct. at 1825.

The CID issued in this case differs significantly from the on-site inspection in *Barlow's* in that the CID does not authorize an immediate intrusion into a protected zone of privacy, but authorizes the taking of testimony and the production of documents at a time subsequent to service of the CID. In that respect, the CID is analagous to an administrative subpoena, which has been the subject

of much litigation wherein the subpoena was tested against the requirements of the Fourth Amendment. *See* United States v. Morton Salt Co., 338 U.S. 632, 70 S.Ct. 357 (1950). Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 66 S.Ct. 494 (1946). *Cf.* See v. City of Seattle, 387 U.S. 541, 87 S.Ct. 1737 (1967).

In See v. City of Seattle, *supra* at 542-43, the Court pointed out that:

> [W]hen an administrative agency subpoenas corporate books and records, the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome. . . . In addition, while the demand to inspect may be issued by the agency, in the form of an administrative subpoena, it may not be made and enforced by the inspector in the field, and the subpoened party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply.

The Fourth Amendment requirements set forth in *Barlow's* are basically the same as those required for investigatory subpoenas; however, the differences in timing and manner of intrusion into protected zones of privacy by the use of a surprise on-site inspection, such as the one in *Barlow's*, require different measures procedurally to ensure the reasonableness of the search. The critical factor in *Barlow's* was the demand for immediate entry and inspection of non-public premises over the objection of the owner. Under such circumstances, absent a requirement that the inspecting agency go before a neutral magistrate and secure a search warrant, the immediacy of the demand and inspection effectively would preclude any opportunity for a judicial determination of

the reasonableness of the search. This is not the case where an administrativ agency seeks information through the service of a subpoena. Given the time frame of a subpoena, it is sufficient if the statute under which the subpoena is issued gives the subpoened party the opportunity to seek a judicial determination of the reasonableness of the demands, prior to the imposition of any sanction for his failure to comply. See U.S. v. Morton Salt Co., 338 U.S. 632, 70 S.Ct. 357 (1950).

The Tennessee CID statute provides the subpoened party with the requisite opportunity for a judicial determination of the reasonableness of the subpoena demands prior to the enforcement of the demand. T.C.A. § 8-6-404 requires judicial approval before any compulsory compliance or sanctions can be obtained by the attorney general and reporter for failure of the subpoened party to comply with the demand. If the subpoened party is of the opinion the requests contained in the demand are unreasonable, he can refuse to comply with the demand and raise the issue as a defense to any action brought by the attorney general and reporter to enforce compliance. U.S. v. United Mine Workers of America, 330 U.S. 258, 295, 67 S.Ct. 667 (1947). Such a system of judicial review after a civil investigative demand is issued has been sanctioned. *See* U.S. v. Morton Salt Co., 338 U.S. 632, 70 S.Ct. 357 (1950).

Mr. Lipman also takes the position that the civil investigative demand denies appellees due process in that it requires him "to divulge privileged and protected matters and to forfeit his rights to judicial review." We see no merit in this contention. T.C.A. § 8-6-407 provides for the confidentiality of documents turned over to the attorney general pursuant to a civil investigative demand. Further, where contested, the production of documents can not be compelled by the attorney general without the approval of the chancellor. Any question of the appropri-

ateness of the documents would be decided in the context of a judicial hearing, thus preserving the due process rights of appellees.

Appellees also argue that the civil investigative demand statute permits the attorney general to compel testimony in violation of a witness's privilege against self-incrimination. "The constitutional privilege against self-incrimination can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution." Kastigar v. United States, 406 U.S. 441, 92 S.Ct. 1653 (1972). The privilege against self-incrimination necessarily limits statutory procedures, whether or not such limitation is included in the statute, and a judicial procedure under which the subpoened party can invoke the privilege is provided in the CID statute. T.C.A. § 8-6-405.[1]

The judgment of the Court of Appeals that the Civil Investigative Demand statute is unconstitutional is reversed. The judgment that the CID issued in this case is invalid is affirmed. The cause is remanded to the Chancery Court of Davidson County for further proceedings consistent with the opinion of this court. Costs incident to the appeal are adjudged against Wine & Spirits Wholesalers of Tennessee, Inc., and its surety.

/s/ Robert E. Cooper
ROBERT E. COOPER

Concur:

Brock, C.J.
Fones, Harbison, JJ.
and Cantrell, Sp.J.

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[1] Also of interest is T.C.A. § 69-107 which grants immunity from criminal prosecution to a witness compelled to testify in an action to enforce the state antitrust statutes.

APPENDIX

EXHIBIT A

Antitrust Div. No. 001

CIVIL INVESTIGATIVE DEMAND
STATE OF TENNESSEE

Office of the Attorney General and Reporter
(Pursuant to Chapter 646, Public Acts of 1976)

In the Matter of:

The Antitrust Division's Investigation of the Tennessee Liquor Industry

To:

Norman Lipman, President
Wine & Spirits Wholesalers of Tennessee, Inc.
12th Floor—First American Center
Nashville, Tennessee

Pursuant to the request of Attorney General William M. Leech, Jr. you are hereby commanded to appear before the Attorney General and Reporter or his designated representative on the 20th day of March, 1979, at 10:00 a.m. o'clock at Room 316, Attorney General's Office, 450 James Robertson Parkway, Nashville, Tennessee.

You are further commanded to bring with you the following: All documents lisited and demanded in Attachment 2 to this Civil Investigative Demand and the signed original of the Affidavit of Compliance in accordance with the definitions and instructions that are Attachment 1 to this Civil Investigative Demand. For any questions contact William J. Haynes, Jr., Deputy Attorney General.

Witness, William H. Leech, Jr., Attorney General and Reporter of the State of Tennessee, at Office in Nashville, Tennessee.

Issued: February 19, 1979.

WILLIAM M. LEECH, JR.
Attorney General and Reporter

By: /s/ William J. Haynes, Jr.
Deputy Attorney General
(615) 741-2672

TENNESSEE CODE ANNOTATED. Sections 8-6-401 *et seq.*

8-6-401. Authority to give oaths and require testimony.—The attorney general and reporter, in performing the duties of his office where the state of Tennessee is a party litigant or there is reasonable cause to indicate it will be a party litigant is hereby empowered to require any person to testify under oath as to any matter which is a proper subject of inquiry by the attorney general and reporter. The attorney general and reporter or his designees are authorized to administer all necessary oaths.

8-6-402. Investigative demands for production of documents and testimony.—For these purposes, the attorney general and reporter is empowered to issue civil investigative demands to require the attendance of witnesses or the submission of documents, or both, at specified times and places, to give testimony in the case or matter therein stated, mentioning the parties to the inquiry and the party at whose instance he is called, and, if necessary, requiring him to also bring with him any books, documents, or other writings, records or tangible objects under his control, which may be pertinent to the inquiry. . . .

8-6-403. Service of investigative demand.—Service of such civil investigation demand shall be had by a designated representative of the attorney general and reporter handing a copy of the demand to such witness, or if the witness cannot be found, then by leaving a copy of the demand at the residence or usual place of business of the witness. . . .

8-6-404. Failure to comply with investigative demand.—Failure of any witness to comply with the terms of a civil investigative demand shall be certified to the chancery court of the chancery division

in which the witness resides, and such chancery court shall exercise the authority granted it by law in the treating of contempt of court matters, including but not limited to those powers granted in §§ 23-903—23-905; all to the end that the witness shall be compelled to appear to give testimony at the time and place specified by the chancery court.

8-6-405. Penalty for failure to testify when served with investigative demand.—Any witness who appears as directed by the civil investigative demand, but upon appearance refuses to testify on matters not privileged by law, shall be punished as prescribed in § 8-6-404 hereof.

* * * *

8-6-407. Confidentiality of writings, records or tangible objects obtained by attorney general.—All testimony, books, documents, or other writings, records or tangible objects obtained by the attorney general pursuant to §§ 8-6-401 and 8-6-402 shall be confidential and shall not be publicly divulged by the office of the attorney general except in the discharge of the duties of the office or in legal proceedings in which the state is a party.

STATE OF TENNESSEE, ex rel., THOMAS H. SHRIVER,
DISTRICT ATTORNEY GENERAL

and

NORMAN M. LIPMAN, PRESIDENT, WINE & SPIRITS
WHOLESALERS OF TENNESSEE, INC.,
Plaintiffs-Appellants

vs.

WILLIAM M. LEECH, JR.,
ATTORNEY GENERAL AND REPORTER,
Defendant-Appellee

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

[Filed Mar. 28, 1980]

APPEAL FROM PART 2, 7th CHANCERY COURT,
DAVIDSON COUNTY

THE HONORABLE C. ALLEN HIGH, CHANCELLOR

[Names of Counsel Omitted in Printing]

HENRY F. TODD
JUDGE

AFFIRMED IN PART, REVERSED IN PART, REMANDED

OPINION

This suit was filed as a suit in the nature of quo warranto and as a suit for declaratory judgment and injunctive relief in respect to a "Civil Investigative Demand" issued by the office of the Attorney General and Reporter of the State of Tennessee.

The defendant, Attorney General, filed a "Motion to Dismiss", which was treated as a motion for summary

judgment because certain matters outside the pleadings were considered by the Court.

The Chancellor sustained defendant's motion and dismissed the complaint. Both the District Attorney and the relator have appealed.

The issues as stated by appellants are as follows:

"I. Whether plaintiffs' complaint sets forth constitutional and statutory claims on which relief can be granted

A. Whether the Attorney General has authority to conduct an anti-trust investigation where there is no statute conferring such authority and the Legislature has considered but failed to grant the power.

B. Whether the compulsory process issued by the Attorney General without authorization by a neutral and detached magistrate is an unreasonable search and seizure.

C. Whether the secret, non-reciprocal discovery sought by the Attorney General violates the due process and equal protection clauses of the State and Federal constitutions.

D. Whether the statutory requirement that a civil investigative demand be issued personally by the Attorney General and Reporter prohibits the issuance of a CID by other persons.

E. Whether the Attorney General may conduct an investigation pursuant to a civil investigative demand which fails to state the matter under investigation and fails to identify the parties to the inquiry as required by law.

F. Whether the statute allowing the Attorney General to petition for contempt adequately

protects plaintiffs' constitutional rights to due process and to be privileged against self-incrimination and precludes plaintiffs from maintaining this declaratory action.

G. Whether the Attorney General may demand the creation of documents and the execution of sworn affidavits without statutory authority.

II. Whether plaintiffs' claim that defendant has unlawfully and unconstitutionally exercised the authority of the office of Attorney General and Reporter states an action in the nature of quo warranto.

The complaint alleges and exhibits a "Civil Investigative Demand" issued on February —,* 1979, over the signature (typed), William M. Leech, Jr., Attorney General and Reporter, By (in script) William J. Haynes, Jr. Said document reads in pertinent part as follows:

"In the Matter of:

The Antitrust Division's Investigation of the Tennessee Liquor Industry.

To: Norman Lipman, President
Wine & Spirits Wholesalers of Tennessee, Inc.
12th Floor—First American Center
Nashville, Tennessee

Pursuant to the request of Attorney General William M. Leech, Jr., you are hereby commanded to appear before the Attorney General and Reporter or his designated representative on the 20th day of March, 1979, at 10:00 a.m. o'clock at Room 316, Attorney General's Office, 450 James Robertson Parkway, Nashville, Tennessee.

---

* The exact date is illegible on the copy in the record.

> You are further commanded to bring with you the following: All documents listed and demanded in Attachment 2 to this Civil Investigative Demand and the signed original of the Affidavit of Compliance in accordance with the definitions and instructions that are Attachment 1 to this Civil Investigative Demand. For any questions contact William J. Haynes, Jr., Deputy Attorney General."

Attached to said document was a three-page document entitled, "Definitions and Instructions."

Also attached was a two-page document containing the text of T.C.A. §§ 8-630, 631, 632, 633, 634, 635, and 636.

Also attached were two forms of "Affidavits of Compliance" for execution by plaintiff, Lipman.

Also attached was a document entitled, "Civil Investigative Demand—Attachment No. 2" consisting of a three-page list of documents to be produced in response to the demand.

Also attached was a two-page document entitled "Supplemental Instructions for Attachment 1 to the Civil Investigative Demands."

The complaint also exhibits a copy of a letter from counsel for relator to the Attorney General requesting the reasons for the investigation and certain procedural details.

The complaint also exhibits a letter from the Attorney General in response to the preceding letter.

The complaint alleges that:

> 1. The "Civil Investigative Demand" is an unlawful exercise of authority by the Attorney General; that the Attorney General is without constitutional or statutory authority to issue or enforce any "Civil Investigative Demand."

2. The statute (T.C.A. §§ 8-630, et seq.) authorizing such demands is unconstitutional.

3. The statute confers no powers of investigation but merely provides procedure for carrying out powers otherwise granted.

4. The Attorney General has exceeded the demands set out in the statute.

5. The Attorney General has acted unconstitutionally in his efforts to demand information of plaintiff.

6. Certain matters demanded by the Attorney General are privileged.

The prayers of the complaint are that its insistences be upheld and that the Attorney General be restrained and enjoined from proceeding with said "Civil Investigative Demand."

The Attorney General filed a "Motion to Dismiss" which joins issue on the legal assertions of the complaint. For some reason, unexpressed in the motion, there was filed with the motion the affidavit of William J. Haynes, Jr.—and a copy of a letter written by the affiant to all recipients of "Civil Investigative Demands."

The Chancellor filed a nineteen page memorandum followed by a final decree in which he held:

1. That plaintiffs' action as a quo warranto suit was dismissed.

2. That in any pre-complaint investigations under the Civil Investigative Demand Statutes:

a. The fruits of such investigations may not be used as substantive evidence in any subsequent litigation, but must be "confined to uses such as impeachment";

b. Any recipient of a Civil Investigative Demand may challenge the demand in the enforcement proceeding brought pursuant to T.C.A. § 8-633 and is not subject to citation for *criminal* contempt except for refusal to obey a *judicial* order;

c. In any enforcement proceeding under T.C.A. § 8-633, the Attorney General must demonstrate reasonable cause to believe that the State will be a party to litigation specified in the demand and that the information demanded is reasonable.

3. That, as limited by the decree, the Civil Investigative Statutes are constitutional.

In connection with Issue I.(c), above, appellants insist that Chapter 646, Public Acts of 1976, the "C.I.D. Statute (T.C.A. §§ 8-630 et seq.), is unconstitutional because it violates the due process and equal protection clauses of the State and Federal Constitutions.

The "C.I.D. Statute" is composed of T.C.A. §§ 8-630—636, incl. which read as follows:

"8-630. Authority to give oaths and require testimony.—The attorney general and reporter, in performing the duties of his office *where the state of Tennessee is a party litigant or there is reasonable cause to indicate it will be a party litigant* is hereby empowered to require any person to testify under oath as to any matter which is a proper subject of inquiry by the attorney general and reporter. *The attorney general and reporter or his designees are authorized to administer all necessary oaths.* [Acts 1976 (Adj. S.), ch. 646, § 1.]

8-631. Investigative demands for production of documents and testimony.—For these purposes, the

attorney general and reporter is empowered to issue civil investigative demands to require the attendance of witnesses or the submission of documents, or both, at specified times and places, to give testimony in the case or matter therein stated, mentioning the *parties to the inquiry and the party at whose instance he is called*, and, if necessary, requiring him to also bring with him any books, documents, or other writings, records or tangible objects under his control, which may be pertinent to the inquiry. No witness called to testify or to produce records, books, documents, writings or other tangible objects under §§ 8-630—8-635, shall be required to testify in any county other than his county of residence or the county where the records or tangible objects are found under the witness' control. [Acts 1976 (Adj.S.), ch. 646, § 2.]

8-632. Service of investigative demand.—Service of such civil investigation (sic) demand shall be had by designated representative of the attorney general and reported handing a copy of the demand to such witness, or if the witness cannot be found, then by leaving a copy of the demand at the residence or usual place of business of the witness. Such process shall run throughout the state but shall not require any witness to testify in any county other than his county of residence or the county where records or or tangible objects demanded are found under the witness' control. [Acts 1976 (Adj.S.), ch. 646, § 3]

8-633. Failure to comply with investigative demand.—Failure of any witness to comply with the terms of a civil investigative demand shall be certified to the chancery court of the chancery division in which the witness resides, and such *chancery court shall exercise the authority* granted it by law in the treating of contempt of court matters, in-

cluding but not limited to those powers granted in §§ 23-903—23-905; all to the end that the *witness shall be compelled* to appear to give testimony at the time and place specified by the chancery court. [Acts 1976 (Adj.S.), ch. 646, § 4.]

8-634. Penalty for failure to testify when served with investigative demand.—Any witness who appears as directed by the civil investigative demand, but upon appearance refuses to testify on matters not privileged by law, *shall be punished* as prescribed in § 8-633 hereof. [Acts 1976 (Adj.S.), ch. 646, § 5.]

8-635. Witness fees and mileage on investigative demands.—Any witness served with a civil investigative demand shall be paid fees and mileage on the same basis as are authorized to be paid witnesses in the courts of this state. [Acts 1976 (Adj.S.), ch. 646, § 6.]

8-636. Confidentiality of writings, records or tangible objects obtained by attorney general.—All testimony, books, documents, or other writings, records or tangible objects obtained by the attorney general pursuant to §§ 8-630 and 8-631 shall be confidential and shall not be publicly divulged by the office of the attorney general except in the discharge of the duties of the office or in legal proceedings in which the state is a party. [Acts 1978 (Adj.S.), ch. 890, § 1.]" (Emphasis supplied)

The clear and unequivocal intent and effect of the statute is to confer upon the Attorney General of the State, the official legal advocate of the State of Tennessee in all of its litigation (except local criminal prosecutions) the power, on his own motion and on behalf of himself and his clients to summon witnesses for discovery, that such witnesses shall be *compelled* to appear and give testi-

mony, and that any witness who appears "as directed by the civil investigative demand but refuse to testify *shall* be punished." On its face, the act leaves no discretion to the Chancery Court to decide whether the witness shall be required to appear and testify and no discretion as to whether or not a defaulting witness shall be punished.

The act purports to enjoin some confidentiality as to disclosures, but in no way limits the use of disclosures in the prosecution or defense of state litigation.

The express purpose of the statute is to grant to the attorney for the State of Tennessee an awesome power not granted to the attorney for any other litigant or prospective litigant who appears or expects to appear before the courts of this state. It should be emphasized that the power is not conferred upon a state official to be used for the general public good, but is effective only when the State is or expects to be a party to civil litigation. The attorney for the State is authorized to make an ex parte judicial determination favorable to himself and his clients that:

> (a) The State (including its officers and agencies) is a party litigant (to a suit as plaintiff or defendant) or,
>
> (b) "There is reasonable cause to indicate" that the State (its officers or agencies) will be a party litigant (as plaintiff or defendant at any undefined future time in any type of lawsuit whatsoever in any court whatsoever).

Upon making such determination, the Attorney General is authorized to require any person (whomsoever) (without any prior determination of reasonable cause to believe that such person actually has or probably has information pertinent to the pending or anticipated litigation) to appear to give testimony and produce documents; but the authority before whom the citizen is to appear is

not designated in the act. Upon failure of the recipient to comply with such requirement, the act provides that the Chancery Court *shall* exercise its authority in the treatment of contempt matters: all to the end that the government, litigating with one of its citizens in one of its courts may have an unequal and unfair advantage in preparation for trial.

Such favored treatment of one party to litigation without equivalent opportunity to the other party is contrary to even handed justice. See *People* v. *Anaconda Wire and Cable Co.*, 256 N.Y.S.2d 121 (1965).

Due process requires reciprocal discovery. *Wardius* v. *Oregon*, 412 U.S. 470, 93 S.Ct. 2208 (1973). Non reciprocal discovery may be justified only by strong showing of special public interest. Special public interest is not the interest of the state government in the result of litigation to which it is a party. Special public interest involves an area of activity which affects the public safety, health, welfare or morals to the extent of justifying governmental regulation or restraint of the activity. By definition, *special* public interest cannot apply to all aspects of private life. The act under discussion allows discovery in any area of life so long as it is useful in real or probable litigation of the State.

In 81A, C.J.S., States, § 374, pp. 994-995 is found the following text:

> "On entering the Courts as a litigant, the state is bound by the general rules of practice and procedure established by the courts in the discharge of their duties, even though the state sues in its sovereign, as contradistinguished from its proprietory capacity. When the state invokes the aid of the Courts, it must submit to the application of the same principles which govern private suitors, and by bringing an action the state subjects itself to the procedure estab-

lished for its final and complete disposition in the courts, by way of appeal or otherwise."

In the view of this Court, a statute such as the one under review, which purports to create a special advantage to the State as a litigant in the courts by granting to the attorney for the State an unlimited power of pre trial discovery, which power is not granted to the adversaries of the State in its litigation, is a denial of equal protection under the law (U.S. Constitution, Amendment 14) (Constitution of Tennessee, Article I, Section 17).

There is another and more compelling reason why the subject statute is unconstitutional, and that is the provision of the invasion of privacy of information and effects without due process. There is a constitutional right to be secure against unreasonable searches and seizures. U.S. Constitution, Amendment 4; Constitution of Tennessee, Article 1, Section 7.

Any warrant authorizing invasion of privacy and seizure of private papers and documents must be issued by a neutral and detached magistrate. *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 98 S.Ct. 1816 (1978), Johnson v. United States, 333 U.S. 10 (1948).

The attorney for an interested party is ipso facto, incapable of being a neutral, detached adjudicator of any question affecting the interests of his client.

As to search warrants issued by an attorney general, see *Coolidge* v. *New Hampshire*, 403 U.S. 450 (1971).

Although not called a "search warrant", the "Civil Investigative Demand" is a device for accomplishing the same result.

The statute does not contain the slightest hint of a provision for a detached, neutral determination of the propriety of the demand by the attorney for one side of

an actual or contemplated controversy. By its obvious failure to provide due process in the determination of the prerequisites for issuance of the demand, the statute falls short of constitutional requirements.

The protection of the Fourth Amendment is not limited to physical intrusion into premises, it includes forceable production of documents. *Hale* v. *Hinkle*, 201 U.S. 43, 26 S.Ct. 370 (1906), Boyd v. U.S., 116 U.S. 616, 6 S.Ct. 524 (1886).

Even if the demand be considered no more than a subpoena to testify, the scheme of the statute is unconstitutional as being an unreasonable deprivation of due process of law. By its very nature a subpoena is the means of calling a witness before some neutral, detached tribunal, then and there to answer questions by partisan questioners, but under the protection and control of the neutral, detached tribunal with the authority and duty to rule upon procedural matters such as claim of privilege. A subpoena is not issued by a partisan desiring the witness, but by the neutral, detached tribunal which has the power to quash the subpoena if improvidently issued. No such protection is afforded by the statute while placing the burden upon the recipient of the demand to apply for judicial relief with a resulting lawsuit of which this suit is an example.

Surely, America has not reached such a state of decay of liberties that innocent citizens may be hauled before a partisan lawyer without a supervising authority to protect the rights of the citizen.

Accordingly, this Court holds that Chapter 808, Public Acts of 1976, T.C.A. §§ 8-630—636, incl. is unconstitutional and void.

However, if this Court should be in error in said holding, there are other issues which would control the result in the present case.

Appellants point out that the process in the present case was not issued by the Attorney General and Reporter but by one acting as his assistant. The statute, T.C.A. §§ 8-630, 631 confers the power upon the Attorney General and Reporter without any reference to any deputy or assistant. The subpoena states that it is issued at the request of the Attorney General and Reporter. This presents the incongruous spectacle of the attorney for the state applying to one of his subordinates (as a detached neutral magistrate) to issue a subpoena to require the citizen to appear and testify before the subordinate (magistrate) who will question the citizen to elicit from him information of value, benefit and advantage to be used by the Attorney General and Reporter to the advantage of his client, the State, in its civil litigation with its lowly citizen, the witness.

The whole scheme of the law and the manner of its utilization simply is contrary to the genius of American justice, equality before the law.

Generally duties involving the exercise of great discretion and judgment are not delegable. 7 C.J.S., Attorney General, § 5.

In *United States* v. *Giordano*, 416 U.S. 505, 94 S.Ct. 1820 (1974), it was held that a wiretap order was void because it was *applied for* by an executive assistant to the Attorney General where the statute required that such applications may be authorized by the Attorney General or any assistant attorney general specifically authorized by the Attorney General.

In *State* v. *Farha*, 218 Kan. 394, 544 P2d 341 (1975), Cert.Den., 426 U.S. 949 (1976) it was held that the law which authorized "the principal prosecuting attorney" to apply for a wiretap order did not apply to the assistants of such principal prosecuting attorney.

Defendant-appellee relies upon T.C.A. § 8-603 as authority of assistants of the Attorney General to exercise the discretionary authority entrusted to the Attorney General, himself. This Court does not find such broad meaning in said statute which is intended to authorize the Attorney General, after making discretionary decisions to delegate to his assistants the ministerial duties of carrying out his decisions. It is unthinkable that a state official, named by the Supreme Court for a period of eight years, might be expected by the Legislature to abdicate all of the heavy decisional duties of his office by delegating same to appointed subordinates.

The power granted by the "C.I.D. Statute" is of a quasi judicial nature which ought not, in its nature, be delegated.

Moreover, § 8-630 recites "the attorney general and reporter *or his designees* are authorized to administer all necessary oaths." If assistants had general power to act as the alter ego of the Attorney General, the emphasized words would not have been necessary in the statute. By authorizing 'designees' (assistants) to administer oaths, the statute excluded the grant of other powers to 'designees' (assistants). "Inclusio unius, est exclusio alterius."

Thus, if the "C.I.D. Statute" should be constitutional, its implementation must be triggered by a decision of the Attorney General, himself, stating with particularity the grounds of his decision, the names of the parties to the existing or expected litigation, the nature of same, and the particular persons and things to be subject to the "C.I.D. Demand" and why. Only after such determination by the Attorney General should a "C.I.D. Demand" be issued and that over his own signature.

In the present case it does not appear that the Attorney General, himself, conformed to the standards just stated, hence the demand issued was and is invalid.

The "C.I.D. Demand", quoted above, was indefinite, nebulous and incomplete. There is no statement as to the "parties to the inquiry", which means the parties to the anticipated litigation; the reasons for issuance or proper description of the documents requested.

There is a constitutional right to freedom from unreasonable and irrelevant investigative demands. *Oklahoma Press* v. *Walling*, 327 U.S. 186, 66 S.Ct. 494 (1946).

This Court respectfully disagrees with the holding of the Chancellor that provision in the statute providing for enforcement of process by contempt petition to the Chancery Court cures the inherent constitutional vices of the statute and the manner of its issuance.

As noted above, the Chancellor undertook to amend the statute in an effort to make it constitutional. It is true that the courts prefer to place a constitutional, rather than an unconstitutional, interpretation upon challenged statutes. However, inserting judicial conditions into the application of a statute is not interpretation. It is judicial amendment of legislation which violates the Constitution of Tennessee by disregarding the mandated "Separation of Powers." Constitution of Tennessee, Article II, Section 2.

This Court does not agree with the Chancellor that a statutory provision for recourse to the courts is a cure-all for an unconstitutional delegation of judicial power. Providing an ambulance to the hospital does not adequately protect the rights of citizens to be free from assaults by the police.

Appellants also insist that the assistant attorney general was without statutory authority to demand or require that appellants provide a written narrative, lists, or a certificate of compliance.

No authority is found in the cited statutes for demanding the items mentioned.

Appellants also insist that the Chancellor erred in rejecting the suit in the nature of quo warranto.

The Chancellor's holding in this respect was in accord with authorities which hold that such a suit must challenge the right of an individual to hold or exercise the powers of a given office. This suit does not challenge the right of the present incumbent to hold and exercise the powers of the office of Attorney General and Reporter of the State of Tennessee, or the rights of the individual who issued the "C.I.D." to hold and exercise the powers of Assistant Attorney General and Reporter.

This suit challenges the scope of the powers of the Attorney General and Reporter and of his assistants or deputies. As such, it is not a quo warranto action. The purposes of the action may be accomplished otherwise by the declaratory judgment which was also sought in appellant's suit.

Considerable space in the briefs has been devoted to the issue of whether the Attorney General has the power to conduct antitrust investigations. Title 69, Chapter 1, T.C.A., forbids trusts, unlawful restraint of trade and discrimination, § 69-104 provides for forfeiture of charter and franchise of corporations violating §§ 61-101 and 103 and states:

> "It is made the duty of the attorney general to enforce these provisions."

If the "C.I.D. Statute" is constitutional and *if* the demand was properly issued, and *if* litigation is reasonably expected to enforce forfeiture of a charter of a corporation under §§ 61-101 and 103, then it would appear that the demand would reasonably lie within the duties of the Attorney General and litigation to which the State would be a party as required by § 8-630.

The defendant-appellee has cited a great volume of authorities supporting the validity of various statutes authorizing various officials to conduct various investigations of various activities. Said authorities have been examined, but are not discussed because they are not in point. They relate to the power of the Legislature to authorize administrative investigation of *particular* activities which partake of a *special public interest*, such as health, safety, and trade abuses. This Court concedes such legislative authority as to matters of special public interest. However, this Court denies such authority in respect to any and every person, or form of activity which is so unfortunate as to be found in the position of litigating with the State or representing what the Attorney General believes to be a threat of litigation.

Narrow conferral of authority for investigation for the protection of the public may be constitutional. Broad conferral of such authority for the sole purpose of giving the State a "head start" on its opponents in court is not constitutional, nor is it consistent with the American ideal of even handed justice and fair treatment by the government.

A governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedom. *Griswold* v. *Connecticut*, 381 U.S. 479, 14 L.Ed2d 510, 85 S.Ct. 1678 (1965).

This case is not the most appropriate case for a ruling of the nature being made. The liquor business has long been considered to bear such possibilities of danger as to justify surveillance and regulation far beyond that imposed on other businesses.

The very fact of close regulation and limitation of wholesale and retail licenses results in a situation of apparent partial or quasi monopoly which encourages

and give impetus to accusations of monopolistic practices. The liquor business might be an appropriate legislative target for further special supervision and surveillance in this regard; but this is not the nature of the legislation under consideration. The mere fact that the liquor business, or antitrust activities, might be the subject of the presently proposed investigation, or might be the subject of a valid law does not validate the present law of such general application, or the process issued thereunder.

The present "C.I.D." law does not authorize investigation limited to particular activities which are deemed to involve a special public interest. If so, the result might possibly be different. The present law authorizes investigation of anybody and everybody, anything and everything, which might relate to present or future litigation of the State. As such, it is too broad, too unequal, too unjust to be valid under our system of justice under law as set out in the Federal and State Constitutions.

In summary, this Court makes the following responses to the issues presented by appellant:

I. The complaint sets forth claims on which relief can be granted.

A. The Attorney General does have the power to conduct State litigation for forfeiture of franchises and charters for violation of Title 69, Chapter 1, T.C.A. and to make any lawful investigation in connection with such litigation.

B. The process issued in the present case is an unreasonable search and seizure.

C. The discovery provided by T.C.A. § 8-630 et seq. violates the due process and equal protection clauses of the State and Federal Constitutions.

D. Only the Attorney General, himself, is authorized to issue a demand under T.C.A. § 8-630.

E. A demand issued under T.C.A. § 8-630 is not valid without a statement therein of the nature of the existing or expected litigation and the names of the parties thereto and a statement of the factual grounds for issuance of the demand.

F. The provision of the statute, T.C.A. § 8-630 et seq., for contempt through the Chancery Courts does not adequately protect constitutional rights violated by the statute or preclude the present action.

G. The Attorney General does not have the power to require creation of documents or the execution of affidavits.

II. Plaintiffs' complaint does not state a cause of action in quo warranto.

That part of the Chancellor's decree which dismisses plaintiffs' suit in the nature of quo warranto is affirmed. That part of the decree of the Chancellor which dismisses the remainder of plaintiffs' suit is reversed. Since no motion for summary judgment was made by the plaintiffs, it is not deemed proper to enter judgment in this Court. The cause will be remanded to the Chancellor for disposition of the cause in accordance with this opinion.

Affirmed in part, reversed in part.
Remanded.

/s/ Henry F. Todd
HENRY F. TODD
Judge

SHRIVER, P. J. Concurs
CORNELIUS, Concurs

DECREE ENTERED JULY 20, 1979—M.B. 110, Page 250

IN THE CHANCERY COURT OF
DAVIDSON COUNTY, TENNESSEE

No. 79-761-II

STATE OF TENNESSEE, ex rel., THOMAS H. SHRIVER and NORMAN M. LIPMAN, PRESIDENT WINE & SPIRITS WHOLESALERS OF TENNESSEE, INC.,
Plaintiff,

v.

WILLIAM M. LEECH, JR.
ATTORNEY GENERAL & REPORTER,
Defendant.

FINAL JUDGMENT

This cause came before the Court on June 1, 1979 by special setting by the Court upon the defendant's Motion to Dismiss the Plaintiffs' Complaint alleging a *quo warranto* claim and seeking a declaratory judgment on the constitutionality of the Civil Investigative Demand statutes, T.C.A. § 8-630 *et seq.* Upon consideration of the complaint and the exhibits thereto, the defendant's motion to dismiss and the attachment thereto, the briefs of the parties, the argument of counsel and the entire record; and for the reasons set forth in the Memorandum Opinion filed June 21, 1979, that is incorporated herein by reference, the Court ORDERED:

1) That the defendant's Motion to Dismiss the plaintiffs' action as a *quo warranto* action is GRANTED.

2) That the provisions of T.C.A. § 8-630 *et seq.*, the Civil Investigative Demand statutes are constitutional.

3) That the petitioners' complaint is DISMISSED with costs taxed to the plaintiffs.

This cause came before the Court again on July 6, 1979 upon the plaintiff Lipman's Motion for Reconsideration and Clarification and the defendant's Motion for Reconsideration of the Court's June 21, 1979 Memorandum Opinion. Upon consideration of the plaintiff's motions and the defendant's reply thereto, the defendant's motion, the briefs of the parties, the argument of counsel and the entire record, the Court, for the reasons set forth in a Memorandum Opinion dated July 12, 1979 that is incorporated herein by reference, ORDERED:

1) That the plaintiff's motion for reconsideration is DENIED in part and GRANTED in part; and

2) That the defendant's Motion for Reconsideration is GRANTED; and

3) That the plaintiff's request for an interlocutory appeal is denied.

WHEREFORE, it is ORDERED, ADJUDGED and DECREED in this action that:

1) Restraining Order entered by the Court on May 4, 1979 is hereby DISSOLVED.

2) That the defendant's motion to dismiss this action as a *quo warranto* action is hereby GRANTED and the *quo warranto* action is hereby DISMISSED: and

3) That the provisions of T.C.A. § 8-630 *et seq.*, the Civil Investigative Demand statutes, are hereby declared constitutional and the petitioners' complaint that challenges these statutes is hereby DISMISSED.

4) That with all issues in the complaint resolved by the Court, this action is hereby DISMISSED.

5) That the costs of this action are taxed to the plaintiffs.

It is so ORDERED this the 20 day of July, 1979.

/s/ C. Allen High
C. ALLEN HIGH
Chancellor

APPROVED FOR ENTRY:

THOMAS H. SHRIVER
District Attorney General

IN THE CHANCERY COURT, PART II,
AT NASHVILLE

No. 76-761-II

STATE OF TENNESSEE, ex rel., THOMAS H. SHRIVER and NORMAN M. LIPMAN, PRESIDENT OF WINE & SPIRITS WHOLESALERS OF TENNESSEE, INC.

vs.

WILLIAM M. LEECH, JR.
ATTORNEY AND REPORTER

MEMORANDUM

This case is before the Court on the plaintiff Lipman's motion for reconsideration and clarification and the defendant's motion for reconsideration of this Court's June 21, 1979 Memorandum opinion. The plaintiff's motion alleged the following grounds:

1. The Court's ruling should be clarified to explicitly hold that the Attorney General and Reporter's reasonable cause for issuance of the CID must be demonstrated at the enforcement hearing.
2. That portion of the opinion concluding that the Attorney General had the power to issue CIDs and to delegate that power should be reconsidered.
3. The argument made by the plaintiff that the CID statute unconstitutionally violates the separation of powers doctrine should be explicitly dealt with.
4. That portion of the opinion dealing with the sufficiency of the particular CID issued to the plaintiff should be reconsidered.

The defendant's motion seeks reconsideration of that portion of the opinion which placed limitations on the

use of evidence obtained through the issuance of the CID. The plaintiff's motion is granted in part and denied in part. The defendant's motion is granted.

Probable Cause

The plaintiff seeks a clarification of that portion of the order regarding the evidentiary burden imposed at the CID enforcement proceedings. Specifically, the plaintiff seeks an explicit ruling from the Court that the Attorney General is charged with the burden of demonstrating probable cause for the issuance of the CID. The Court agrees that this is the responsibility of the Attorney General and states that the Attorney General is charged with demonstrating administrative probable cause for the issuance of the CID at the enforcement hearing.

Authority of the Attorney General for the Issuance of the CID

The plaintiff next asserts that the portion of the opinion regarding the authority of the Attorney General to issue a CID should be reconsidered because, *inter alia*, the affidavit of Deputy Attorney General Haynes should not have been considered since it was struck from the record by agreement of the parties. The Court concludes that reconsideration of this issue should be denied, and notes that the authority of the Attorney General for the issuance of the CID and the proper delegation of responsibility for its issuance was sufficiently shown even without consideration of the affidavit submitted by General Haynes.

Separation of Powers

The plaintiff also asserts that the issue of the unconstitutionality of the CID statute by virtue of its violation of the doctrine of separation of powers was not

dealt with in the opinion. The Court concludes that the motion for reconsideration on this issue should be denied, noting that the opinion implicitly recognizes that this claim of unconstitutionality was without merit.

Sufficiency of the Description on the CID Issued to the Plaintiff

The plaintiff next requests that the issue of the sufficiency of the description and the naming of the parties on the CID be reconsidered. The Court concludes that that request should be denied, those issues being subject to being raised at any enforcement hearing which may be held regarding the issuance of the CID to this plaintiff.

Reciprocal Discovery

The defendant seeks reconsideration of the Court's ruling regarding reciprocal discovery. The Court has given further consideration to that portion of the opinion, and concludes that evidence which results from the issuance of the CID should be dealt with in the following manner. A distinction should be drawn between documentary evidence and that acquired through oral testimony. Documents obtained by the Attorney General do not become admissible in subsequent litigation as substantive evidence merely by virtue of their status as having been obtained pursuant to a CID; neither do they become inadmissible for any purpose solely because they have been so obtained, although they may be inadmissible for other reasons. However, oral testimony obtained pursuant to a CID will only be admissible for such purposes as impeachment, and will not be admissible as substantive evidence in subsequent litigation.

Interlocutory Appeal

The plaintiff has also requested an interlocutory appeal. The Court concludes that the granting of such an

appeal would be inappropriate. Since the motion to dismiss the declaratory judgment action on the constitutionality of the statute has been granted, and there are no issues which have not been resolved by this Court, the case is not in the proper posture for an interlocutory appeal.

CONCLUSION

The plaintiff's motion is denied in part and granted in part. The defendants' motion is granted. Counsel for the defendants shall prepare the order.

/s/ C. Allen High
C. ALLEN HIGH
Chancellor

July 12, 1979

cc: Keith M. Lundin
William J. Haynes
Daniel C. Kaufman

IN THE CHANCERY COURT,
FOR DAVIDSON COUNTY, PART II
AT NASHVILLE, TENNESSEE

No. 79-761-II

STATE OF TENNESSEE, ex rel., THOMAS H. SHRIVER and NORMAN M. LIPMAN, PRESIDENT OF WINE & SPIRITS WHOLESALERS OF TENNESSEE, INC.

VS.

WILLIAM M. LEECH, JR.
ATTORNEY AND REPORTER

MEMORANDUM

This is a quo warranto action which also seeks a declaratory judgment of the constitutionality of the civil investigative demand statutes, T.C.A. § 8-630, et seq.

The plaintiffs are the State of Tennessee and Norman M. Lipman, President of the Wine and Spirits Wholesalers of Tennesesee.

The defendant is William M. Leech, Jr., Attorney General and Reporter for the State of Tennessee.

The case is before the Court on the defendant's motion to dismiss. Because matters outside the pleadings have been presented to the Court, the motion will be treated as a Rule 56 motion for summary judgment. Rule 12.02(6) T.R.C.P.

For the reasons cited below, the Court grants judgment in defendant's favor in the quo warranto action, and declares the Tennessee Civil Investigative Demand Statutes to be constitutional. The Court notes, however, the insufficiency of the description of the conduct being investigated on the civil investigative demand issued to plaintiff Lipman.

In February, 1979, plaintiff Lipman was served at his place of business with a civil investigative demand issued pursuant to T.C.A. § 8-630, et seq. These statutes provide in part that:

> The attorney general and reporter, in performing the duties of his office where the State of Tennessee is a party litigant or there is reasonable cause to indicate it will be a party litigant is hereby empowered to require any person to testify under oath as to any matter which is a proper subject of inquiry by the attorney general and reporter. The attorney general and reporter or his designees are authorized to administer all necessary oaths. T.C.A. § 8-630.
>
> For these purposes, the attorney general and reporter is empowered to issue civil investigative demands to require the attendance of witnesses or the submission of documents, or both, at specified times and places, to give testimony in the case or matter therein stated, mentioning the parties to the inquiry and the party at whose instance he is called, and, if necessary, requiring him to also bring with him any books, documents, or other writings, records or tangible objects under his control, which may be pertinent to the inquiry. T.C.A. § 8-631.

The civil investigative demand served on Lipman states that the demand relates to "the Matter of the Anti-Trust Division's Investigation of the Tennessee Liquor Industry." The demand commanded the plaintiff appear at the office of the Attorney General on March 20, 1979 and that he bring with him certain documents relating to the Wine and Spirits Wholesalers of Tennessee, Inc. The demand was signed by William J. Haynes, Deputy Attorney General.

By letter dated March 31, 1979, counsel for the Wine and Spirits Wholesalers of Tennessee, Inc., requested that the Attorney General clarify the civil investigative demand by disclosing the identity of the parties involved and by describing the nature of the conduct under investigation. The Attorney General refused both requests. On May 4, 1979, Lipman sought and was granted a restraining order prohibiting the defendant from "issuing, executing or enforcing any civil investigative demand pursuant to Chapter 646 of the Public Acts of 1976, as amended."

Quo Warranto Action

T.C.A. § 23-3801(1)-(6) sets out the grounds for a quo warranto action. Only sections 1 and 2 apply in the case of a public official. *State, ex rel., Strader* v. *Ward*, 508 S.W. 2d 539 (Tenn. Sup. Ct. 1974). These sections provide that:

> Action lies in the name of the State against the person or corporation offending, in the following cases: (1) Whenever any person unlawfully holds or exercises any public office or franchise within this State, or any office in any corporation created by the laws of this State. (2) Whenever any public officer has done or suffered to be done any action which works a forfeiture of his office.

No claim has been made by the plaintiffs that William M. Leech, Jr., is not the appropriate person to hold the office of Attorney General and Reporter and to exercise the authority of that office. The evidence shows that the Attorney General acted pursuant to express legislative authority and gives no indication that he has committed an act which works a forfeiture of his office. Judgment should therefore be granted in favor of the defendant in the quo warranto action.

Constitutionality of the Civil Investigative Demand Statutes

The complaint asserts that the statute is unconstitutional on the following grounds:

(1) The Attorney General has no authority to conduct an antitrust investigation.

(2) The civil investigative demand was not issued by the Attorney General and Reporter as required by the civil investigative demand statute.

(3) The Attorney General is without statutory authority to demand the creation of documents or the execution of affidavits.

(4) The Attorney General's demand for confidential and trade secret information constitutes the taking of property without due process of law.

(5) The civil investigative demand compels the plaintiffs to put themselves in jeopardy of criminal prosecution, in violation of the constitutional privilege against self-incrimination.

(6) The civil investigative demand constitutes nonreciprocal discovery which violates the due process and equal protection clauses of the state and federal constitutions.

(7) No opportunity for determination of the reasonableness of the demands has been afforded by the Attorney General in violation of the due process clauses of the state and federal constitutions.

(8) The compulsory process issued by the Attorney General without authorization by a neutral and detached magistrate is an unreasonable search and seizure.

(9) The Attorney General has failed to comply with the requirements of the statute by refusing to

state the matter or case under investigation and by refusing to identify the parties to the inquiry.

Authority of the Attorney General to Conduct an Antitrust Investigation

The plaintiffs asesrt that the Attorney General has no authority to conduct an antitrust investigation. This Court concludes otherwise. The Attorney General is charged by statute with the representation of the State and is required to perform all duties imposed upon him by law. T.C.A. § 8-603(a), (b) and § 8-609(1), (5), (7), and (8). T.C.A. § 69-104 provides that the Attorney General is required to enforce the antitrust laws against foreign corporations. Under State law, he is charged with attending to matters affecting the State Treasury and the State as a purchaser of goods can be an injured party under the Federal Anti-Trust Law capable of seeking injunctive relief for economic injury. *Georgia* v. *Evans*, 316 U.S. 159, 162—163 (1942); *Georgia* v. *Pennsylvania Railroad Company*, 324 U.S. 439, 447 (1945).

Statutory obligations of State representation in antitrust actions have thus been imposed upon the Attorney General. The duty of investigation of antitrust violations has not been delegated to any other individual or agency. The investigation of possible violations of the antitrust laws is logically necessary to their enforcement. The Attorney General's statutorily created responsibility to perform all duties imposed upon him by law would thus logically include the authority to discover information when a possible violation of antitrust laws under which the State has enforcement powers is indicated.

Issuance of the Civil Investigative Demand

The plaintiffs assert that since the civil investigative demand was signed by Deputy Attorney General Wil-

liam J. Haynes and not by Attorney General William Leech, Jr., it was not properly issued pursuant to the statute. The Court is not persuaded by this argument. Under T.C.A. § 8-603, the Attorney General is authorized to appoint such assistants as he may deem necessary to perform the duties of the office . . . and . . . such duties as may be assigned to them by the Attorney General." T.C.A. § 6-830 provides that the Attorney General "in performing the duties of his office . . . is hereby empowered to require any person to testify under oath . . . and . . . the Attorney General and Reporter or his designees are authorized to administer all necessary oaths."

Thus, under Tennessee law, the Attorney General may delegate the duties of his office to any of his assistants. Deputy Attorney General Haynes states in his affidavit that he was designated by the Attorney General to issue civil investigative demands and the matter of the antitrust division's investigation of the Tennessee liquor industry. The Court is satisfied that this was an appropriate delegation of authority and that the issuance of the civil investigative demand in this manner was proper.

Authority of the Attorney General
to Demand the Compiling of Lists
and the Execution of Compliance Affidavits

Plaintiff asserts that the Attorney General has no authority to require the creation of lists. The Court is not persuaded that under no circumstances does the Attorney General have the authority to compel lists. *Material Handling Institute* v. *McLaren*, 426 F.2d 90 (3rd Cir. 1970). However, the issue of whether this particular plaintiff may be required to produce specific lists is not a proper issue for consideration in this declaratory judgment action.

The plaintiff also asserts that the Attorney General cannot compel the signing of an affidavit of compliance. The affidavit provides that the affiant has reviewed the civil investigative demand, that a search has been made for the requested documents, that those submitted are authentic and genuine, and that no documents have been held back, removed, or destroyed. In effect, that the civil investigative demand had been complied with.

T.C.A. § 8-631 empowers the Attorney General to take testimonial evidence in civil investigative demand proceedings and to administer oaths for this purpose. It is this Court's conclusion that the statute gives the Attorney General the authority to require the execution of a sworn statement of this type, and that the exercise of this power is constitutional.

Demand for Alleged Trade Secret Information as a Violation of Due Process of Law

Lipman also asserts that the civil investigative demand requires him to "divulge privileged and protected matters and to forfeit his rights to judicial review" in violation of constitutional rights to due process of law. T.C.A. § 8-636 provides for confidentiality of those documents which are turned over to the Attorney General pursuant to a civil investigative demand. However, no document may be compelled by the Attorney General without the approval of the Court. Any question of the appropriateness of the production of the specific documents will be decided in the context of a judicial hearing. Due process rights of the plaintiff are thus preserved and the statutory scheme is constitutional. However, whether particular documents requested in the civil investigative demand issued to Lipman may be properly refused is not before the Court on this motion.

Violation of the Privilege Against Self-Incrimination

Lipman argues that the civil investigative demand statute permits the Attorney General to compel testimony without the safeguards required by the Tennessee and United States Constitutions, that is, in violation of the witness's privilege against self-incrimination. "The constitutional privilege against self-incrimination can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution." *Kastigar* vs *United States*, 406 U.S. 441, 444, 92 S. Ct. 1653 (1972). That the civil investigative demand statute does not specifically state that there is a privilege against self-incrimination does not render the statute unconstitutional. The privilege against self-incrimination necessarily limits the statutory procedures without the inclusion of such a statement, and a judicial procedure in which the recipient of a civil investigative demand can invoke the privileges is provided for in the statute.

The question of whether the self-incrimination privilege may be asserted by Lipman in response to any of the requests posed by the civil investigative demand issued to him is not now before this Court.

Non-Reciprocal Discovery

Plaintiffs' next allegation is that civil investigative demand statute constitute non-reciprocal discovery which violates the equal protection and due process clauses of the state and federal constitutions. They cite *Wardius* v. *Oregon*, 412 U.S. 470, 93 S. Ct. 2208 (1973) in support of that proposition. This Court finds that case distinguishable. At *Wardius*' criminal trial, a witness' alibi evidence was struck and *Wardius* was not permitted to testify regarding his alibi as a sanction for his failure to file a notice of alibi in accordance with an Oregon

statute which provided that a defendant must give notice five days prior to trial of an alibi defense or he was precluded from relying upon it. There was no provision in the statute that the prosecution give notice of any rebuttal of such defense. The Court found it a violation of due process and "fundamentally unfair to require the defendant to divulge the details of his own case while at the same time subjected him to the hazards of surprise concerning refutation of the very pieces of evidence which he discloses to the State." 93 S. Ct. at 2213.

T.C.A. § 8-636 provides that materials obtained by the attorney general in the course of proceedings under the CID statutes may be used in legal proceedings. However, this is not the type of use to which the Court spoke in the *Wardius* case. *Wardius* dealt with substantive evidence offered at trial. It is this Court's conclusion that the fruits of pre-complaint investigations conducted under the civil investigative demand statute may not be introduced as substantive evidence in the subsequent litigation, but rather must be confined to uses such as impeachment. Once litigation has been initiated, the recipient of a civil investigative demand would be entitled to fully reciprocal discovery under the Tennessee Rules of Civil Procedure.

Opportunity for Determination of the Reasonableness of the Request Contained in the Civil Investigative Demand

The plaintiffs claim that the statute violates due process rights to have the reasonableness and relevancy of demands determined by a court. That is, that the recipient of a civil investigative demand issued under the present statutory scheme is deprived of sufficient information to determine the reasonableness of the request, and that there is no opportunity to be heard at a meaningful time and in a meaningful manner. The Court disagrees.

T.C.A. § 8-631 provides that a civil investigative demand may be issued to require testimony on the production of documents "in the case or matter therein stated." Thus, the statute provides that a description of the matter being investigated is necessary to the lawful issuance of the civil investigative demand.

Although the sufficiency of the description in the civil investigative demand issued to Lipman is not before the Court for the purposes of this declaratory judgment action, the Court notes its insufficiency in describing the matter under investigation. The only indication of the nature of the investigation is the statement in the caption of the civil investigative demand that it relates to the matter of the "antitrust division's investigation of the Tennessee liquor industry." This is insufficient. In each case cited by the attorney general in defense of this civil investigative demand, the descriptions are more revealing of the scope of the investigation. In *Lightning Rod Manufacturer's Assn.* v. *Staal*, 339 F.2d 346 (7th Cir. 1964) the CID provided that:

> This civil investigative demand is issued pursuant to the provisions of the Anti-trust Civil Process Act . . . In the course of an inquiry for the purpose of ascertaining whether there is or has been a violation of the provisions of Title 15, United States Code, Secs. 1 and 2 by conduct of the following nature: conspiracy to restrain trade by fixing the prices of lightning protection systems and components thereof and by conspiring to refuse to deal with the purchaser of components thereof; conspiracy to monopolize by agreeing to exclude a seller of lightning protection from the sale thereof.

In *Mobile Oil Corporation* v. *Killian*, 301 A.2d 562 (Conn. Super. Ct. 1973), the civil investigative demand described the purpose of the investigation as:

> Because of alleged conspiracy for the purpose of, or having the effect of, fixing, controlling, or maintaining prices and rates in the distribution and sale of gasoline in the State of Connecticut.

In *Petition of Gold Bond Stamp Co.*, 221 F. Supp. 391 (D. Minn. 1963), aff'd. 325 F.2d 1018 (8th Cir. 1964) the civil investigative demand provided that it was investigating:

> Restrictive practices and acquisitions involving the dispensing, supplying, sale, or furnishing of trading stamps and the purchasing and sale of goods and services in connection therewith.

This was broader than that issued to Lipman, however, the Court labeled it "short and terse" upholding its sufficiency while noting that "it seems quite apparent that the petitioner knew the intent and scope of the demands served upon it." 221 F. Supp. at 397.

It is difficult for the Court to conceive of the plaintiff's being able to formulate effective objections to the requested documents in light of the absence of any real description of the nature of the conduct which the State seeks to investigate.

The Court concludes, however, that if the recipients of the civil investigative demand are provided with a sufficient description of the conduct and investigation to enable them to determine the relevancy of the demands, the statute provides them sufficient opportunity for a hearing on these objections to protect due process rights. T.C.A. § 8-633 requires judicial approval before any compulsory compliance or sanctions can be obtained for failure to comply with the civil investigative demand.

Obviously, should the recipient of the civil investigative demand comply, there would be no basis for holding him in contempt. Should he feel the requests contained

in the demand are improper, he is entitled to present these issues to the Court as a defense to any contempt citation. *U.S.* v. *United Mine Workers of America*, 330 U.S. 258, 295, 67 S. Ct. 667 (1947). Such a system of judicial review after the civil investigative demand is issued is not improper. *U.S.* v. *Morton Salt*, 338 U.S. 632 (1949).

T.C.A. § 8-631 does authorize the imposition of contempt as provided in T.C.A. § 23-903, that is, should an individual defy the order of the Court to produce the documents after a judicial hearing and a determination by the Court of the suitability of the request therefor, he could receive the ultimate sanction of imprisonment. This, however, could only occur after he has been afforded a full opportunity to present his reasons for refusing to produce the requested information, the Court has found the reasons insufficient, and he has denied a judicial order to comply with the investigative demand.

The Issuance Of the Civil Investigative Demand As An Unreasonable Search and Seizure

The plaintiffs final argument against the constitutionality of the civil investigative demand statutes, grounded on the recent Supreme Court case of *Marshall* v. *Barlows, Inc.*, 436 U.S. 307, 98 S. Ct. 1816 (1978), is that the issuance of a civil investigative demand without the authorization of the neutral and detached magistrate is an unreasonable search and seizure. This Court disagrees.

The *Barlows* case held that the statutory authorization for inspection under the Occupational Health and Safety Act without a warrant or its equivalent was unconstitutional. The plaintiffs argument is that since Fourth Amendments protections are not confined to searches and seizures but also extend to the orderly taking of documents under compulsion of process, *Barlows* is controlling here. In *Boyd* v. *U.S.*, 116 U.S. 616, 6 S. Ct. 524 (1886)

the Court stated that the Fourth Amendment applies not only to searches and seizures but to the orderly taking under compulsion of process. Thus, the Court said, a man has the right to be secure in his private papers. However, the Court has also stated that neither incorporated nor unincorporated associations can plead an unqualified right to conduct their affairs in secret, and that they could not claim any equality with an individual in the enjoyment of a right to privacy protected by the Fourth Amendment. In *U.S.* v. *Morton Salt*, 338 U.S. 632 (1949), the Federal Trade Commission sought to compel the production of documents and the Court stated that it was sufficient if the inquiry was within the authority of the agency, the demand was not too indefinite, and the information sought was reasonable.

Although a more stringent protection of privacy rights is indicated when dealing with the compelling of production of the documents of an individual, it is this Court's opinion that the *Barlows* case does not preclude a finding of constitutionality of the Tennessee civil investigative demand statutes.

The plaintiffs cite note 22 of the *Barlows* opinion as a specific recognition by the Court that agency inspection of records and documents requires a warrant. In that footnote, the Court stated that "deliniating the scope of a search with some care is particularly important where documents are involved." There are several important distinctions, however, between the *Barlows* case and the case at bar. The *Barlows* case dealt with a search without a warrant or its functional equivalent in the context of an inspection of the premises where the danger of going outside the scope of the warrant was significant in light of the general scope of inspection of documents provided for in the Occupational Health and Safety Act regulations. 98 S. Ct. 1826 n. 22. The *Barlows* decision was based on case law

which held that business men like occupants of a residence have a constitutional right to go about their trade free from unreasonable entries upon their property, and that the Fourth Amendment prohibition against unreasonable searches and seizures protects against warrantless intrusions during civil as well as criminal investigation. Thus, the Court stated, "The critical fact in this case is that entry over Mr. Barlows' objection is being sought by a government agency." 98 S. Ct. at 1821. All the cases cited by the plaintiffs in which Barlows has been applied involves onsight inspections. The plaintiffs have presented this Court with no case where the *Barlows* analysis has been applied to find an unreasonable search and seizure in a situation which involves the production of documents with no on-site inspection.

More important than the distinction between onsight inspections and offsight compelling of documents, however, is the Court's holding that a warrant, or *its functional equivalent*, is required. This Court concludes that even in those situations where the taking of documents may rise to Fourth Amendment protection, the civil investigative demand statute provides adequate constitutional protection. The Court in *Barlows* specifically stated that, "The injunction entered by the District Court . . . should not be understood to forbid the Secretary from exercising . . . inspection authority pursuant to regulations or judicial process that satisfy the Fourth Amendment." The District Court did not address the issue whether the order for inspection that was issued in this case was the functional equivalent of a warrant, and the Secretary has limited his submission in this case, to the constitutionality of a warrantless search of the Barlows establishment." 98 S. Ct. 1827 n. 23. A warrant provides assurances of reasonableness of the search and advice to the owner regarding the scope and object of the search beyond which the search is not expected to

proceed. These assurances of reasonableness can be satisfied in the context of the civil investigative demand statute. Any questions regarding the scope and reasonableness of the search can be judicially determined prior to the investigative demand recipient's being required to surrender any documents.

Conclusion

Judgment is granted in favor of the defendant in the quo warranto action

The civil investigative demand statutes, T.C.A. § 8-630, et seq., are declared constitutional. The costs are taxed to the plaintiffs. Mr. Haynes shall prepare the order.

/s/ C. Allen High
C. ALLEN HIGH
Chancellor

June 21, 1979

cc: Keith M. Lundin
Daniel Kaufman
William J. Haynes, Deputy Atty. Gen.
Donald F. Paine, Knoxville
Thomas H. Shriver, District Atty. Gen.

SUPREME COURT, NASHVILLE

Appeal No. 80-33-I
Davidson Equity

No. 79-761-II

STATE OF TENNESSEE, ex rel.,
THOMAS H. SHRIVER, DISTRICT ATTORNEY GENERAL

and

NORMAN M. LIPMAN, PRESIDENT,
WINE & SPIRITS WHOLESALERS OF TENNESSEE, INC.,
Plaintiffs-Appellants

vs.

WILLIAM M. LEECH, JR.,
ATTORNEY GENERAL AND REPORTER,
Defendant-Appellee

Judgment of Court of Appeals
Affirmed in Part and Reversed in Part.

JUDGMENT

This cause coming on to be heard upon the entire record from the Court of Appeals, Middle Section at Nashville, application for permission to appeal having been heretofore granted, briefs and argument of counsel, upon consideration whereof, the Court is of opinion that the judgment of the Court of Appeals should be affirmed in part and reversed in part.

It is, therefore, ordered and adjudged by this Court that the judgment of the Court of Appeals that the Civil Investigative Demand statute is unconstitutional is reversed; the judgment that the CID issued in this case is invalid is affirmed. The cause is remanded to

the Chancery Court of Davidson County for further proceedings consistent with the opinion of this Court, and for the collection of costs accrued below.

Costs of appeal will be paid by Wine & Spirits Wholesalers of Tennessee, Inc., Principal, and Hooker & Waddey, Surety, for which execution may issue if necessary. 2/2/81.

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

[Filed March 9, 1981]

DAVIDSON EQUITY

STATE OF TENNESSEE, ex rel.,
THOMAS H. SHRIVER, DISTRICT ATTORNEY GENERAL

and

NORMAN M. LIPMAN, PRESIDENT
WINE & SPIRITS WHOLESALERS OF TENNESSEE, INC.

vs.

WILLIAM M. LEECH, JR.
ATTORNEY GENERAL AND REPORTER

ORDER

The petition to rehear filed on behalf of Norman M. Lipman, President of Wine and Spirits Wholesalers of Tennessee, Inc., is denied. Costs are adjudged against the petitioner.

/s/ Robert E. Cooper
ROBERT E. COOPER, J.

Concur:
Harbison, C.J.
Fones, and Brock, JJ.
Cantrell, Sp.J.

IN THE CHANCERY COURT
FOR DAVIDSON COUNTY, TENNESSEE

No. 79-761-II

STATE OF TENNESSEE, ex rel.,
THOMAS H. SHRIVER,

and

NORMAN M. LIPMAN, PRESIDENT
WINE & SPIRITS WHOLESALERS OF TENNESSEE, INC.,
Plaintiffs,

VS.

WILLIAM M. LEECH, JR.,
ATTORNEY GENERAL AND REPORTER
Defendant.

COMPLAINT

This is an action in the nature of quo warranto and for a declaratory judgment, for a restraining order and for other injunctive relief.

1. The Plaintiff first above-named is the State of Tennessee.

2. Norman M. Lipman, the second plaintiff above-named, is President of Wine & Spirits Wholesalers of Tennessee, Inc. (hereinafter "WSWT"). WSWT is an incorporated trade association having a principal place of business in Nashville, Davidson County, Tennessee. Norman Lipman is a resident of Nashville, Davidson County, Tennessee, and his business address is P.O. Box 24696, Nashville, Tennessee 37202.

3. Defendant, William M. Leech, Jr., is the Attorney General and Reporter for the State of Tennessee. The Attorney General and Reporter maintains his office and principal place of business at 450 James Robertson Parkway, Nashville, Tennessee 37219.

4. This court has jurisdiction pursuant to T.C.A. §§ 16-601-03, T.C.A. § 23-2801 *et seq.* and T.C.A. § 23-1102.

5. Venue is proper in Davidson County, Tennessee pursuant to T.C.A. § 23-2811 and T.C.A. § 16-617.

6. On or about February 20, 1979 Norman M. Lipman was served at his place of business by a representative of the Office of the Attorney General and Reporter with a document styled "Civil Investigative Demand." A copy of this document is attached as Exhibit A to this Complaint, but need not be copied for purposes of service of process. This Civil Investigative Demand (hereinafter "CID") is signed by Deputy Attorney General William J. Haynes, Jr., and purports to be issued by the Attorney General and Reporter pursuant to Chapter 646, Public Acts of 1976 (T.C.A. § 8-630 *et seq.*, as amended). The CID directed Norman Lipman to appear before the Attorney General and Reporter on the 20th day of March, 1979, and there produce certain described documents and lists relating to Wine & Spirits Wholesalers of Tennessee, Inc. On the request of counsel, the Office of the Attorney General has extended the time for compliance with the attached CID to 10:00 a.m. on May 9, 1979.

7. The CID served on Plaintiff Lipman states that the demand relates to "the Matter of The Antitrust Division's Investigation of the Tennessee Liquor Industry." Plaintiff Lipman states on information and belief that the Office of the Attorney General and Reporter served numerous CIDs on various businesses and individuals involved in the beverage alcohol industry in Tennessee on or about the time the attached CID was served.

8. By letter dated March 2, 1979 under the signature of Deputy Attorney General William J. Haynes, Jr., the Office of the Attorney General and Reporter issued "Sup-

plemental Instructions for Attachment 1 to the Civil Investigative Demands." The "Supplemental Instructions" and the cover letter of Mr. Haynes are attached as Exhibit B, but need not be copied for purposes of service of process.

9. By letter dated March 13, 1979, counsel for WSWT, Inc. requested the Attorney General and Reporter to clarify numerous aspects of the CID directed to Plaintiff Lipman. A copy of the request of WSWT is attached hereto as Exhibit C, but need not be copied for purposes of service of process. By letter dated April 2, 1979, Deputy Attorney General William J. Haynes, Jr. responded to the request for clarification of March 2, 1979. A copy of this response is attached hereto as Exhibit D, but need not be copied for purposes of service of process.

CLAIMS FOR RELIEF

COUNT ONE

10. The issuance, execution or enforcement of Civil Investigative Demands is an unlawful exercise of authority by William M. Leech, Jr. For the reasons stated in Counts Two through Five below, the Attorney General and Reporter for the State of Tennessee is without Constitutional or statutory authority to issue, execute or enforce any civil investigative demand pursuant to Chapter 646 of the Public Acts of 1976, as amended.

COUNT TWO

11. The statute which purports to authorize the Attorney General and Reporter to issue civil investigative demands—Chapter 646 of the Public Acts of 1976, as amended and codified at T.C.A. § 8-630 *et seq.*—is unconstitutional, null, void and of no force or affect for the following reasons:

a. The statute confers on the Attorney General and Reporter, a member of the Judicial Department of State Government, investigative powers belonging to the Executive Department of State Government, in violation of the separation of powers provisions of Article 2, Section 2 of the Constitution of the State of Tennessee.

b. The statute classifies litigants and potential litigants in the courts of this state and confers upon the Attorney General an unreasonable favored litigant status in violation of Article 1, Section 17, Article 1, Section 8, and Article 11, Section 8 of the Constitution of the State of Tennessee and in violation of the Fourteenth Amendment to the United States Constituion.

c. The statute fails to require a disinterested magistrate's determination of probable cause at any stage of the proceeding, in violation of Article 1, Section 7, Article 1, Section 8, and Article 1, Section 17 of the Constitution of the State of Tennessee and in violation of the Fourth and Fourteenth Amendments to the United States Constitution.

d. The statute fails to require or to provide for court determination of the reasonableness or relevency of investigative demands in violation of Article 1, Section 7, Article 1, Section 8, and Article 1, Section 17 of the Constitution of the State of Tennessee and in violation of the Fourth and Fourteenth Amendments to the United States Constitution.

e. The statute authorizes the taking of property without due process of law by allowing the Attorney General to extract trade secrets and other property rights without adequate protection or compensation in violation of Article 1, Section 8, Article 1, Section 17, and Article 1, Section 21 of the Constitution of

the State of Tennessee and in violation of the Fourteenth Amendment to the United States Constitution.

f. The statute abrogates constitutional privileges, including the privilege against self-incrimination, in violation of Article 1, Section 7, Article 1, Section 8, Article 1, Section 9, and Article 1, Section 17 of the Constitution of the State of Tennessee and in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

COUNT THREE

12. Chapter 646 of the Public Acts of 1976, as amended, confers no power on the Attorney General and Reporter to conduct investigations or inquiries, but merely provides a procedure which he may use in performing investigative or inquisitorial duties otherwise granted by statute. The laws of the State of Tennessee do not grant the Attorney General any power to investigate or inquire into alledged violations of state or federal antitrust laws. The issuance, execution or enforcement of a Civil Investigative Demand as part of an antitrust investigation is thus in excess of the statutory authority of the Attorney General of the State of Tennessee.

COUNT FOUR

13. The Attorney General and Reporter has acted without authority and in excess of his purported authority by failing to follow the statutory requirements of Chapter 646 of the Public Acts of 1976, as amended, and by making demands in excess of those authorized by the statute in the following ways:

a. The Attorney General has failed to demonstrate that the State of Tennessee is a party litigant or has reasonable cause to indicate that it will be a party litigant as required by Section 1 of the statute, T.C.A. § 8-630.

b. The Attorney General's demand that Plaintiff execute and deliver an "affidavit of compliance" is without authorization under the law.

c. The Attorney General's demand that the Plaintiff create lists and other non-existent documents and compilations is without authority under the law.

d. The Attorney General has failed to state the parties to the inquiry as required by Section 2 of the statute, T.C.A. § 8-631.

e. The Attorney General has failed to provide an adequate description of the case or matter purportely under investigation as required by Section 2 of the statute, T.C.A. § 8-631.

f. The CID served on Plaintiff Lipman is not issued by the Attorney General and Reporter as required by Section 1 and 2 of the statute, T.C.A. § 8-630, § 8-631.

COUNT FIVE

14. The Attorney General has acted unconstitutionally and in violation of Plaintiff Lipman's rights in the following ways:

a. The Attorney General issued the CID without obtaining a disinterested magistrate's determination of probable cause.

b. The Attorney General has failed to provide or promise adequate protection for trade secrets and other property rights of the Plaintiff.

c. The Attorney General has failed to identify the scope and objects of his investigation and thus has denied Plaintiff and the court the right to determine whether the Attorney General's investigation and requests are reasonable, relevent and in good faith.

d. The Attorney General has failed to provide, and in fact disclaims the ability to provide protec-

tion for the production of constitutionally privileged documents.

COUNT SIX

15. Plaintiff Lipman must respond to the CID on or before 10:00 a.m. on May 9, 1979. Compliance with the CID would immediately and irreparably harm Plaintiff and deny to Plaintiff constitutionally protected rights. Compliance would require Plaintiff to reveal privileged and protected matters and to forfeit his rights to judicial review. There is insufficient time to properly prepare and argue the matters at issue prior to May 9, 1979. Plaintiff has no adequate remedy at law. The requirements of Rule 65 of the Tennessee Rule of Civil Procedure are present in this case.

This is the First Request for Extraordinary Relief.

DEMAND FOR JUDGMENT

WHEREFORE, Plaintiff State of Tennessee asks for Judgment and relief as follows:

1. That this court find that Defendant William M. Leech, Jr. has unlawfully exercised the authority of his office and has acted in excess of his authority under the Laws of the State of Tennessee.
2. That this court direct Defendant William M. Leech, Jr., to cease, desist and be forever barred from issuing, executing or enforcing any Civil Investigative Demand pursuant to Chapter 646 of the Public Acts of 1976, as amended.

WHEREFORE, Plaintiff Norman M. Lipman asks for Judgment and relief as follows:

1. A declaration that Chapter 646 of the Public Acts of 1976, as amended is unconstitutional, null, void and of no force or effect.
2. A declaration that the Attorney General's use of a Civil Investigative Demand as part of an antitrust investigation is in excess of the statutory authority of the Attorney General and Reporter.

3. A declaration that the Attorney General has acted without authority and in excess of his authority by failing to follow the statutory requirements of Chapter 646 of the Public Acts of 1976, as amended, and by purporting to make demands beyond the provisions of that statute.

4. A declaration that the issuance of the CID is an unconstitutional act by the Attorney General and Reporter and is in violation of Plaintiff's rights.

5. A declaration that the CID issued by the Attorney General and Reporter is null, void and of no force or effect.

6. That this court issue a restraining order, a temporary injunction, and incorporate a permanent injunction in the final judgment herein enjoining the Attorney General from issuing or enforcing any CID or from using any information he has or may derive from any CID; and further directing the Attorney General to return all documents he may have already obtained pursuant to a CID, to destroy all copies of documents in his possession which were acquired by CID, and to destroy all notes, transcripts or other documents which are the fruit of information obtained through a CID issued by the Attorney General pursuant to Chapter 646 of the Public Acts of 1976, as amended.

7. That this court grant such other and further relief as justice and equity may require.

Respectfully submitted,

/s/ Thomas H. Shriver
THOMAS H. SHRIVER
District Attorney General

HOOKER & WADDEY

/s/ Keith M. Lundin
KEITH M. LUNDIN
Counsel for Plaintiff
Norman M. Lipman, President
Wine & Spirits Wholesalers of
Tennessee, Inc.

KING & BALLOW

/s/ Daniel Kaufman
DANIEL KAUFMAN
Of Counsel

[Verification Omitted in Printing]

EXHIBIT A

CIVIL INVESTIGATIVE DEMAND
STATE OF TENNESSEE

Antitrust Division No. 001

Office of the Attorney General and Reporter

(Pursuant to Chapter 646, Public Acts of 1976)

In the Matter of:

The Antitrust Division's Investigation of the Tennessee Liquor Industry

To:

Norman Lipman, President
Wine & Spirits Wholesalers of Tennessee, Inc.
12th Floor—First American Center
Nashville, Tennessee

Pursuant to the request of Attorney General William M. Leech, Jr., you are hereby commanded to appear before the Attorney General and Reporter or his designated representative on the 20th day of March, 1979, at 10:00 a.m. o'clock at Room 316, Attorney General's Office, 450 James Robertson Parkway, Nashville, Tennessee.

You are further commanded to bring with you the following: All documents listed and demanded in Attachment 2 to this Civil Investigative Demand and the signed original of the Affidavit of Compliance in accordance with the definitions and instructions that are Attachment 1 to this Civil Investigative Demand. For any questions contact William J. Haynes, Jr., Deputy Attorney General.

Witness, William M. Leech, Jr., Attorney General and Reporter of the State of Tennessee, at Office in Nashville, Tennessee.

Issued: February 19, 1979.

WILLIAM M. LEECH, JR.
Attorney General and Reporter

By: /s/ William J. Haynes, Jr.
Deputy Attorney General
(615) 741-2672

[Return of Service Omitted in Printing]

ATTACHMENT NO. 1

DEFINITIONS AND INSTRUCTIONS

1. The term "company" means the corporation, partnership or individual proprietorship upon which this civil investigative demand is served and its parents, subsidiary, affiliates, divisions, and operating management and purchasing units or organizational entities and the predecessors of any of them.

2. The term 'Association' means Wine & Spirits Wholesalers of Tennessee, Inc. Association or any other affiliated or predecessor group of said association, whether formal or informal.

3. The term "you" or "your Company or your Association" means the Company or Association (as defined herein) to which this civil investigative demand is directed, its former and present officers, agents, employees and all other persons acting or purporting to act on behalf of the Company or Association to which this civil investigative demand is directed.

4. The term "documents" means all writings of every kind, including letters, telegrams, memoranda, reports, studies, calendar or diary entries, minutes, pamphlets, notes, charts, tabulations and records of meetings, conferences and telephone and other conversations or communications in the possession, custody or control of the company or association, or any of its officers, directors, employees, or agents made, sent, or received during the period from January 1, 1970 to date of service of this civil investigative demand. The term "documents" also includes reproductions or film impressions of any of the aforementioned writings as well as copies of the documents which are not identical duplicates of the originals, and copies of documents of which the originals are not in the possesison, custody or control of the company or

association. The term "documents" further includes all punch cards or other cards, printouts, tapes or recordings used in data processing, together with the programming instructions or other written material necessary to understand or use such cards, printouts, tapes or recordings.

5. Unless otherwise specified in a particular paragraph, the date covered by this civil investigative demand shall be from January 1, 1970 to the date of this civil investigative demand up to and including the date of service thereof.

6. If the company or Association withholds any documents covered by this civil investigative demand under claim of privilege we would appreciate it if you would state and furnish a list identifying each document for which the privilege is claimed together with the following information: date, sender, recipient, persons to whom copies were furnished together with their job titles, subject, the basis upon which privilege is claimed and the paragraph(s) of this civil investigative demand to which such document pertains.

7. Please identify each document produced in response to this civil investigation demand with the initials of the company or association and number each document consecutively, commencing with the number one. These markings should appear in the lower right hand corner of each document. It would also be appreciated if you would place the document(s) called for by each paragraph of the civil investigative demand in a separate file folder or other separating device, which should be marked with the name of your company or association, date of the civil investigative demand and paragraph of the civil investigative demand. Experience has proven that this system of document control will ensure the prompt return of the documents to you when they are no longer required.

8. Compliance with this civil investigative demand may be by either of the following methods, election of which shall be within the addressee's sole discretion.

a) Compliance by the appearance of an authorized representative of the addressee who will bring with him all documents required to be produced by this civil investigative demand, before the designee of the Attorney General at the time and place stated in the civil investigative demand, or

b) Compliance by delivery by mailing by certified mail all documents called for in this civil investigative demand to William J. Haynes, Jr., Deputy Attorney General, Antitrust Division, Office of Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37219. This method of compliance may be used provided that:

(1) notice of the addressee's election to comply by this method is received by the above office at least 10 days prior to the date for appearance before the designee of the Attorney General; and

(2) the documents delivered or mailed are accompanied by a notarized affidavit in the form attached; and

(3) documents must be received at said office on or before the time for appearance stated in the civil investigative demand.

If this method of compliance is elected by the addressee, personal appearance before the designee of the Attorney General at the time and place stated need not be made. If this method of compliance is elected, please complete the attached "Affidavit of Compliance by Mail."

9. *Document Destruction, Removal and Alteration.*

a) *Document destruction practices*—All documents which establish your company's or association's document destruction practice shall be produced with respect to any destruction of documents for the period from January 1, 1970 to the date of this civil investigative demand.

b) *Removal and Alteration.*

1) "*Removal*" refers to the destruction or mutilation of documents previously in the possession, custody, or control of the company or the association or any of its employees, agents or representatives, and/or the taking and carrying away, whether authorized or not, of documents from the possession, custody, or control of the company or association.

2) "*Alteration*" refers to the alteration, modification, censorship, deletion, addition or the changing in any manner of documents which are in the possession, custody or control of the company or association or any of its employees, agents or representatives or which have been subject to removal (as defined herein.)

c) For the period from January 1, 1970 to the date of this civil investigative demand, list any document which has been subjected to removal (as defined herein) and which falls within the description of any paragraph of this civil investigative demand, and show all pertinent information on such removal, including, but not limited to, the identity of the person or persons authorizing the removal, the identity of the person or persons participating in the decision to effect such removal, the date of each such decision, the date of each such removal, the identity of the persons carrying out such removal, the means used to accomplish such removal, and any other circumstances concerning the removal.

d) For the period from January 1, 1970 to the date of this civil investigative demand, all documents which refer or relate in any way to the alteration (as defined herein) of documents falling within the description of any paragraph of this civil investigative demand, including, but not limited to, the identity of the person or persons authorizing the alteration, the identity of the person or persons participating in the decision to affect such alteration, the date of each such alteration, the identity of the persons carrying out such alteration, the means used to accomplish such alteration, and any other circumstances concerning the alteration.

e) For the period from January 1, 1970 to the date of this civil investigative demand, all documents which, but for removal or alteration as defined herein, would have been produced pursuant to any paragraph of this civil investigative demand shall be listed to show the following information; date, sender, recipient, persons to whom copies were furnished together with their job titles, and the subject of the document.

11. For any documents demanded by this Civil Investigative Demand that would require the reproduction of voluminous sales and/or price invoices, a compilation of the figures contained in such invoices may be submitted in lieu of the reproduction of each such invoice, but, in such instances, the company or association is requested to certify in its compilation that the invoices from which the compilation was made will be preserved and produced if required by the Attorney General or his designee.

12. Originals of all documents must be submitted unless the original of a document is unavailable, in which instance the company shall certify the authenticity of each such document. This blanket certification of authenticity as to all copies of any documents produced

pursuant to this demand is included in the Affidavit of Compliance that is attached hereto.

13. The term "Liquor Product" means whiskey, rum, gin, brandy, cordial, wine, cider, alcohol and any other spiritous, vinous, malt, or fermented liquor, liquid or compound by whatever name called, containing one half of one percent or more of alcohol by volume, which is fit for beverage purposes, except beer.

CIVIL INVESTIGATIVE DEMAND STATUTES

1. Tennessee Code Annotated § 8-630 provides:

> "The attorney general and reporter, in performing the duties of his office where the state of Tennessee is a party litigant or there is reasonable cause to indicate it will be a party litigant is hereby empowered to require any person to testify under oath as to any matter which is a proper subject of inquiry by the attorney general and reporter. The attorney general and reporter or his designees are authorized to administer all necessary oaths."

2. Tennessee Code Annotated § 8-631 provides:

> "For these purposes, the attorney general and reporter is empowered to issue civil investigative demands to require the attendance of witnesses or the submission of documents, or both, at specified times and places, to give testimony in the case or matter therein stated, mentioning the parties to the inquiry and the party at whose instance he is called, and, if necessary, requiring him to also bring with him any books, documents, or other writings, records or tangible objects under his control, which may be pertinent to the inquiry. No witness called to testify or to produce records, books, documents, writings or other tangible objects under §§ 8-630—8-635, shall be required to testify in any county other than his county of residence or the county where the records of tangible objects are found under the witness' control."

3. Tennessee Code Annotated § 8-632 provides:

> "Services of such civil investigation demand shall be had by a designated representative of the attorney general and reporter handing a copy of the demand to such witness, or if the witness cannot be found, then by leaving a copy of the demand at the resi-

dence or usual place of business of the witness. Such process shall run throughout the state but shall not require any witness to testify in any county other than his county of residence or the county where records or tangible objects demanded are found under the witness' control."

4. Tennessee Code Annotated § 8-633 provides:

"Failure of any witness to comply with the terms of a civil investigative demand shall be certified to the chancery court of the chancery division in which the witness resides, and such chancery court shall exercise the authority granted it by law in the treating of contempt of court matters, including but not limited to those powers granted in §§ 23-903—23-905; all to the end that the witness shall be compelled to appear to give testimony at the time and place specified by the chancery court."

5. Tennessee Code Annotated § 8-634 provides:

"Any witness who appears as directed by the civil investigative demand, but upon appearance refuses to testify on matters not privileged by law, shall be punished as prescribed in § 8-633 hereof."

6. Tennessee Code Annotated § 8-635 provides:

"Any witness served with a civil investigative demand shall be paid fees and mileage on the same basis as are authorized to be paid witnesses in the courts of this state."

7. Tennessee Code Annotated § 8-636 provides:

"All testimony, books, documents, or other writings, records or tangible objects obtained by the attorney general pursuant to §§ 8-630 and 8-631 shall be confidential and shall not be publicly divulged by the office of the attorney general except in the discharge of the duties of the office or in legal proceedings in which the state is a party."

AFFIDAVIT OF COMPLIANCE BY MAIL

I, ———————— after being duly sworn do state that I am an authorized representative of the ———————— company or association and that my company or association is complying with the Civil Investigative Demand by certified mail. I hereby certify that all documents called for in the Civil Investigative Demand served upon my company or association were mailed postage prepaid to William J. Haynes, Jr., Deputy Attorney General, Antitrust Division, Office of the Attorney General, 450 James Robertson Parkway, Nashville, Tennessee 37219. I further certify that I have notified the Attorney General or his designee of this method of compliance at least ten (10) days prior to the date for the appearance and production of these documents before the designee of the Attorney General.

————————

Subscribed and sworn to before me this —— day of February, 1979.

———————— My Commission Expires: ————

Notary

AFFIDAVIT OF COMPLIANCE

I, ———— after being duly sworn do state that I am an authorized representative of the ———— Company or Association and:

1) That I have reviewed the Civil Investigative Demand that was served upon the Company or Association by the Attorney General and that I, and others under my direction, have made a search of the company's or association's files for the documents called for in the Civil Investigative demand at each and every location where the company's or association's files and documents are kept.

2) That a complete and comprehensive search was made for the documents called for in the Civil Investigative Demand.

3) That all documents which are responsive to the Civil Investigative Demand are included in the company's or association's return to the Attorney General.

4) That the documents submitted are authentic and genuine documents.

5) That the documents are produced for each paragraph of the civil investigative demand and where no documents were produced for a particular paragraph, I hereby certify that no such documents exist.

6) That unless otherwise noted, no documents demanded by the Civil Investigative Demand have been removed or destroyed.

———————————

Subscribed and sworn to before me this —— day of ————, 1979.

———————————

Notary Public

My Commission Expires: ————

CIVIL INVESTIGATIVE DEMAND— ATTACHMENT NO. 2

The following documents are to be produced before William J. Haynes, Jr., Deputy Attorney General on the day of March 20, 1979 at 10:00 a.m. (Central Standard Time) Room 316, 450 James Robertson Parkway, Nashville, Tennessee.

1. If your Association is incorporated:

   (a) A copy of your corporate charter and all amendments thereto and your by-laws and all amendments thereto.

   (b) Copies of all written notices and agenda for all meetings of the Board of Directors and all minutes of the meeting of the Board of Directors together with a list of all present and former members of the Board of Directors.

   (c) Copies of any document relating to or a written narrative to show the organizational structure of your Association together with any documents or lists to show the former and present officers with a description of the duties of each and the names of persons who were or are assistants to said officers.

   (d) All documents that relate to any and each committee, subcommittee, division, department or unit of your Association, whether formal or informal.

   (e) All documents relating to any meeting, whether formal or informal, of each committee, subcommittee, division, department, unit of your company and to their responsibilities and duties and acts on behalf of your Association.

2. If your Association, is not incorporated, produce:

   (a) All documents describing the status, creation or governance of your organization from its inception and any and all amendments thereto.

(b) A written narrative to show the names of each of the past and former officers, owners or managers of your Association, a description of each person's duties, each person's tenure of office and each person's last known address.

(c) All documents that relate to any and each committee, subcommittee, division, department or unit of your Association, whether formal or informal.

(d) All documents relating to any meeting, whether formal or informal, of each committee, subcomittee, division, department, unit of your company and to their responsibilities and duties and acts on behalf of your Association.

3. All membership lists of the Association.

4. A list to show the dates, times and places of each meeting of the Association membership.

5. Copies of any attendance lists or sheets for any Association meeting or sponsored functions.

6. All documents relating to (a) membership requirements, (b) disciplinary actions against members and (c) membership exclusion.

7. Copies of any Association rules, regulations, policies, code of ethics however denominated, whether formal or informal.

8. All correspondence or documents from any member of the Association relative to the pricing and/or marketing of liquor products by any person in the State of Tennessee.

9. All documents relating to or referring to the Association's position on any action of the Alcoholic Beverage Commission or any agency or branch of the government of the State of Tennessee or any of its political subdivisions.

10. All documents including correspondence relating to the Southern Beverage Journal, its publications and its staff including, but not limited to, Marvin Levin, Jane Levin or Francis Soto.

11. Copies of all reports, studies, surveys, plans, forecasts and sale analyses of the liquor products in the State of Tennessee in the possession or control of the Association.

12. Copies of any price announcements, price lists, discount schedules or other documents in the possession or control of the Association relating to the prices charged for liquor products by any Tennessee liquor wholesaler or retailer.

13. All mailing lists used by your Association in distribution of any of its announcements.

14. All documents reflecting communications, oral or written, with any Tennessee wholesaler or retailer referring or related in any way to the presence or the absence of any restrictions on the liquor business in the State in the Association's possession or control.

15. All financial statements of the Association since January 1, 1970.

16. All telephone bills and expense statements of any company officer, employee, or representative.

17. All documents not covered by any preceding paragraph that relate in any manner to the pricing, marketing, distribution, production or sales of liquor products in Tennessee.

18. A list to show the names, last known home addresses, positions and tenure of all persons employed by your Association other than those persons listed in response to paragraph 1(c) or 2(b).

19. A list of all persons with their addresses who have been contacted or consulted by your company in

your review of this Civil Investigative Demand and the preparation and/or compilation of any documents to be produced pursuant to this Civil Investigative Demand.

WILLIAM M. LEECH, JR.
Attorney General
State of Tennessee
by his designee

/s/ William J. Haynes, Jr.
WILLIAM J. HAYNES, JR.
Deputy Attorney General
State of Tennessee

EXHIBIT B

STATE OF TENNESSEE

[SEAL]

OFFICE OF THE ATTORNEY GENERAL
450 James Robertson Parkway
Nashville, Tennessee 37219

March 2, 1979

By Certified Mail

Norman Lipman, President
Wine & Spirits Wholesalers of Tennessee, Inc.
12th Floor, First American Center
Nashville, Tennessee 37238

RE: In the Matter of the Antitrust Division's Investigation of the Tennessee Liquor Industry. Civil Investigative Demand No. 001

Dear Mr. Lipman:

Enclosed herewith are supplemental instructions that are to be included in the instructions in Attachment 1 to the above numbered Civil Investigative Demand that was served upon your company or your association. These supplemental instructions reflect our attempts to accommodate the several requests for adjustments by some firms in the production of documents called for in the Civil Investigative Demand.

We hope that these instructions will be of assistance to you and if you have any questions, please contact me.

Sincerely,

/s/ William J. Haynes, Jr.
WILLIAM J. HAYNES, JR.
Deputy Attorney General
(615) 741-2672

WJH:bjm
Enclosure
cc: Keith Lundin, Esq.

SUPPLEMENTAL INSTRUCTIONS FOR ATTACHMENT 1 TO THE CIVIL INVESTIGATIVE DEMANDS

14. If any documents that are to be produced, are required by any federal or state agency to remain on the premises of the business, you are requested to submit copies of the affected documents or provide written notice to this office at least ten (10) days prior to the date of production in order to arrange an on-premises inspection of those documents. Such written notice should be directed to William J. Haynes, Jr., Deputy Attorney General, Antitrust Division, 450 James Robertson Parkway, Nashville, Tennessee 37219.

15. If after collection and segregation of documents for a specific paragraph in the Civil Investigative Demand, it appears that the actual production of those documents will involve a voluminous amount of materials, you are requested to give this office written notice ten (10) days prior to the date of production as to the paragraph in the Civil Investigative Demand that demands these voluminous number of documents. We ask all persons to provide the written notice at least ten (10) days prior to the date of production, so that this office may coordinate its trips to the similarly situated firms in the same cities. This office, prior to the date of production, will visit your place of business to review the voluminous documents that would be required by the particular paragraph. We would then seek to arrange an on-premises inspection of those documents at your company's place of business at a mutually agreeable time. It is hopeful that this procedure will avoid any undue burdens for your company in this production process, but maintain the availability of the documents for inspection by this office.

16. In the event that your company or your association will need additional time to collect and segregate the documents demanded by the Civil Investigative Demand, please be advised that the office will grant reasonable extensions of time for production. Please submit a written request for an extension of time at least five (5) days prior to the date for production specified in the Civil Investigative Demand.

17. On the date of production, this office will collect the documents and will maintain the documents in a secure manner. The documents will be returned to you as expeditiously as practicable.

EXHIBIT C

LAW OFFICES
HOOKER & WADDEY
17th Floor, One Commerce Place
Nashville, Tennessee 37230

March 13, 1979

Hand Delivered

Mr. William J. Haynes
Deputy Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219

RE: Anti-Trust Investigation of Tennessee Liquor Industry

Dear Mr. Haynes:

Wine and Spirits Wholesalers of Tennessee, Inc. through its attorneys, Hooker & Waddey, requests clarification of the civil investigative demand served on it by the Attorney General's office. In an effort to facilitate cooperation with the Attorney General's office, WSWT, Inc. asks the Attorney General's office to respond to the following questions:

1. With citations to specific titles and sections, what state or federal anti-trust statutes are relied on by the Attorney General as authority for the current anti-trust investigation of the beverage alcohol industry in Tennessee?

2. If the current investigation of the beverage alcohol industry is not limited to a search for possible violations of state or federal anti-trust laws, what other areas of inquiry and what other alleged

statutory violations are also under investigation by the Attorney General in this proceeding against the beverage alcohol industry?

3. Does the Attorney General's office consider this anti-trust investigation of the beverage alcohol industry to be both civil and criminal in nature?

4. Has the Attorney General's office identified specific objects of this investigation or are all parties considered to be equally suspect?

5. What provisions will the Attorney General make for recognition of and protection of privileged documents?

6. What special treatment will the Attorney General provide for documents which classify as trade secrets?

7. What provision will the Attorney General make for the production of documents in stages?

8. What provision will the Attorney General's office make for the granting of immunity when and if immunity from criminal prosecution becomes an issue in this investigation?

9. What specific complaints of anti-competitive behavior by beverage alcohol wholesalers are currently under investigation by the anti-trust division of the Attorney General's office?

10. What provision will the Attorney General's office make for reverse discovery by the beverage alcohol industry?

It is the feeling of the Board of Directors of Wine & Spirits Wholesalers of Tennessee, Inc. that the trade association must have answers to the above questions before a proper response to the Attorney General's civil investigative demand is possible. It is hoped that the

Attorney General's office will respond adequately to the above questions and that our amicable procedure can be found for complying with the Attorney General's civil investigative demand.

Sincerely,

HOOKER & WADDEY

/s/ Keith M. Lundin
KEITH M. LUNDIN

KML/cm

EXHIBIT D

STATE OF TENNESSEE

[SEAL]

OFFICE OF THE ATTORNEY GENERAL
450 James Robertson Parkway
Nashville, Tennessee 37219

April 2, 1979

Hand Delivered

Keith M. Lundin, Esq.
Hooker & Waddy
17th Floor, One Commerce Plaza
Nashville, Tennessee 37239

RE: Civil Investigative Demand No. 001

Dear Mr. Lundin:

Your letter of March 13, 1979 that was received by this office on March 14, 1979 is hereby acknowledged. In response to the questions contained in your letter, we will consider them seriatim.

1. With citations to specific titles and sections, what state or federal anti-trust statutes are relied on by the Attorney General as authority for the current anti-trust investigation of the beverage alcohol industry in Tennessee?

15 U.S.C. § 15, 15c; Tenn. Code Ann. §§ 8-603(a) and 8-609(9) (Supp. 1978), Tenn. Code. Ann. § 69-104 and the case law thereunder. See also Tenn. Code Ann. §§ 8-630—8-636 that were cited in the CID that was served upon your client on February

20, 1979. The statutory authority to represent the State and its citizens in matters involving antitrust violations necessarily includes the authority to investigate information that represents violations of state and federal antitrust statutes that affect the State and its citizens.

2. If the current investigation of the beverage alcohol industry is not limited to a search for possible violations of state or federal anti-trust laws, what other areas of inquiry and what other alleged statutory violations are also under investigation by the Attorney General in this proceeding against the beverage alcohol industry?

As you will note in the letter to Mr. Harlan Dodson dated March 12, 1979, a copy of which was provided to you and your clients, this investigation relates to violations of the state and federal antitrust laws and this office has never represented otherwise. Accordingly, I do not understand the question insofar as it speculates as to matters not raised or suggested by this office.

3. Does the Attorney General's office consider this anti-trust investigation of the beverage alcohol industry to be both civil and criminal in nature?

This office does not have criminal prosecution authority in antitrust matters and any proceedings by this office are civil in nature, but if this office discovers evidence of criminal activity, we will turn any such evidence over to the appropriate prosecution authorities promptly.

4. Has the Attorney General's office identified specific objects of this investigation or are all parties considered to be equally suspect?

I am uncertain as to the meaning of the term 'objects', but our response construes it as synonymous with the term 'parties'. You are now aware by

virtue of our letter to Mr. Dodson, which pointed out that the State of Tennessee does have information which, if unexplained or unrebutted, represents violations of the state and federal antitrust laws by persons and/or firms in the Tennessee liquor industry. The identities of all persons and/or firms who may be involved or engaged in the anticompetitive practices are unknown at this time. As we have said on earlier occasions, it is the policy of this office to decline a discussion of the details of any ongoing investigation or survey.

5. What provisions will the Attorney General make for recognition of and protection of privileged documents?

Tenn. Code Ann. § 8-636 sets forth the law governing disclosure of any documents including privileged documents that are received in a CID proceeding. If there are any special requests that your client desires to make with respect to the maintenance of documents, please advise and we will consider such request on an individual basis.

6. What special treatment will the Attorney General provide for documents which classify as trade secrets?

See answer to No. 5.

7. What provision will the Attorney General make for the production of documents in stages?

Inasmuch as the Supplemental Instructions provide for on-site inspection of truly voluminous documents at a mutually agreeable time and date, there are stages of production now. We are hopeful that the time provided for production is sufficient for collection of all documents, but we are willing to grant reasonable extensions of time, as needed, by any firms, including your client.

8. What provision will the Attorney General's Office make for the granting of immunity when and if im-

munity from criminal prosecution becomes an issue in this investigation?

> This office does not have the authority to grant immunity from criminal prosecutions to any persons.

9. What specific complaints of anti-competitive behavior by beverage alcohol wholesalers are currently under investigation by the anti-trust division of the Attorney General's office?

> This office does not discuss the details of an anti-trust investigation. For any further response, see my letter to Mr. Dodson.

10. What provision will the Attorney General's office make for reverse discovery by the beverage alcohol industry?

> These Civil Investigative Demand proceedings are investigative in nature, not adjudicatory. Accordingly, we are unaware of any 'reverse discovery rights' in a governmental investigative proceeding. If the CID proceeding becomes a judicial proceeding, of course, the full panoply of discovery procedures will be available and the rules of civil procedures and the decisional law thereunder will govern the discovery rights of the parties.

As we read the CID statutes, we did not feel that your clients' compliance with a CID is made contingent upon our responses to any of the questions in your letter.

Sincerely,

/s/ William J. Haynes, Jr.
WILLIAM J. HAYNES, JR.
Deputy Attorney General

WJH:bjm
cc: All firms in the
liquor industry that were
served with CIDs.

IN THE CHANCERY COURT FOR
DAVIDSON COUNTY, TENNESSEE

[Filed May 4, 1979]

No. 79-761-II

STATE OF TENNESSEE ex rel., THOMAS H. SHRIVER,

and

NORMAN M. LIPMAN, PRESIDENT
WINE & SPIRITS WHOLESALERS OF TENNESSEE, INC.,
Plaintiffs,

vs.

WILLIAM M. LEECH, JR.,
ATTORNEY GENERAL AND REPORTER,
Defendant.

RESTRAINING ORDER

Upon verified complaint filed herein, sworn to and under oath, and upon representations made by counsel during the hearing on Plaintiff's application for a restraining order and, it appearing therefrom that the Defendants, unless restrained forthwith by this court, will issue, execute and/or enforce Civil Investigative Demands against Plaintiff and other persons, and that Plaintiff will suffer immediate and irreparable injury loss or damages before notice can be served and a hearing held thereon;

IT IS THEREFORE, ORDERED, ADJUDGED, AND DECREED that the Defendant, William M. Leech, Attorney General and Reporter, be restrained, pursuant to Rule 65.03, Tennessee Rules of Civil Procedure, from performing any of the following acts:

a. Issuing, executing or enforcing any Civil Investigative Demand pursuant to Chapter 646 of the Public Acts of 1976, as amended.

The Plaintiff's request for a temporary injunction will be heard before this court at 2 p.m. on the 29th day of May, 1979, Chancery Court, Part II, Metropolitan Courthouse, Nashville, Tennessee.

The above temporary restraining order is conditioned upon the Plaintiff executing a bond in the amount of $1,000.00.

Issued at 3:20 p.m. on the 4 day of May, 1979.

/s/ C. Allen High
CHANCELLOR

IN THE CHANCERY COURT OF
DAVIDSON COUNTY, TENNESSEE

No. 79-761-II

STATE OF TENNESSEE ex rel., THOMAS H. SHRIVER,

and

NORMAN M. LIPMAN, PRESIDENT
WINE & SPIRITS WHOLESALERS OF TENNESSEE, INC.,
Plaintiffs,

v.

WILLIAM M. LEECH, JR.,
ATTORNEY GENERAL & REPORTER,
Defendants.

AMENDED MOTION TO DISMISS PURSUANT TO RULE 12.02(6)

Comes William M. Leech, Attorney General & Reporter and moves the Court to dismiss the complaint in this cause pursuant to Rule 12.02(6) of the Tennessee Rules of Civil Procedure for the reason that it fails to state any claim upon which relief can be granted and for the more particular reasons that:

1. The actions of the Attorney General that are the subject matter of this complaint are pursuant to expressed provisions of State law, Tenn. Code Ann. §§ 8-630—8-636 and in performance of the duties conferred upon him by law.

2. That the provisions of Tenn. Code Ann. §§ 9-630—8-636 are constitutional under the state and federal Constitutions as a permissible and valid exercise of the police power of the State to protect the public welfare.

3. The Civil Investigative Demand at issue fully complies with the pertinent statutes.

4. Plaintiff has failed to present any issue as to particular documents demanded by the Civil Investigative Demand at issue.

For these and the reasons expressed in the Amended Memorandum of Law, the Attorney General prays that this action be dismissed.

Respectfully submitted,

/s/ William J. Haynes, Jr.
WILLIAM J. HAYNES
Deputy Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
741-2672

[Certificate of Service Omitted in Printing]

IN THE CHANCERY COURT
OF DAVIDSON COUNTY, TENNESSEE

No. 79-761-II

STATE OF TENNESSEE ex rel., THOMAS H. SHRIVER,

and

NORMAN M. LIPMAN, PRESIDENT, WINE & SPIRITS WHOLESALERS OF TENNESSEE, INC.,
Plaintiffs,

v.

WILLIAM M. LEECH, JR.,
ATTORNEY GENERAL & REPORTER,
Defendant.

AMENDED MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

WILLIAM J. HAYNES, JR.
Deputy Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219

Of Counsel:

WILLIAM M. LEECH, JR.
Attorney General & Reporter

* * * *

[7]

2. The statutory authority permitting the State pre-complaint investigatory powers has a rational basis and furthers an important public interest.

Under Art. 11, Sec. 8, plaintiffs allege that the Civil Investigative Demand statutes create an unreasonable classification of litigants in the State courts by conferring a "favored" status upon the State of Tennessee by granting it pre-complaint investigatory powers.

Under Art. 11, Sec. 8, any statutory classification scheme that is based upon the exercise of the police power of the State will be upheld if any rational basis exists for the classification. *Cosmopolitan Insurance Co.* v. *Northington*, 201 Tenn. 541 (1957). As a general rule, it is within the prerogative of the Legislature to determine by legislative enactment what measures are necessary to protect the public interest. *Chapdelaine* v. *Tennessee State Board of Examiners of Land Surveyors*, 541 S.W.2d 786-87 (Tenn. S.Ct. 1976); *Ford Motor Company* v. *Pace*, 206 Tenn. 559, 335 S.W.2d 360 (1960); *Nance* v. *Piano Company*, 128 Tenn. 1, 8 (1913).

Under the provisions of Tenn. Code Ann. § 8-630, in order for the Civil Investigative Demand statutes to be applicable, the State of Tennessee must be "a party litigant or there is reasonable cause to indicate it will be a party litigant" in an action. If the State of Tennessee is a party in a matter, the public interest is necessarily affected. [8] Litigation by the State, particularly in antitrust matters, would be to enforce public policy and to protect its citizens from illegal trade practices. It is submitted that under the case law it is within the province of the Legislature to exercise the police power in such a manner as to assist the State in the pursuit of any legal claims it may have. Moreover, it is in the public interest that before the State institutes litigation that the State attempt to assure itself that a valid legal claim exists before it imposes the burdens of litigation upon persons and firms in the Courts.

The use of a statutory pre-complaint procedure as a valid and appropriate method for litigation by the government, particularly in antitrust matters, was recognized by a federal judicial panel.

> It is said that vague complaints in civil antitrust cases brought by the government are unavoidable

> because the the inquisitorial power of the Department of Justice in civil matters is inadequate and the Department's only recourse is to file complaints containing indefinite allegations and thereafter to utilize the processes of the court to discover the facts. It may well be th + the powers of investigation of the Department are not sufficient for these tasks and that Congress should be asked to remedy that deficiency, or that ample investigative powers of the Federal Trade Commission should be utilized. The Prettyman Report (Procedure in Antitrust and other Protracted Cases) 13 F.R.D. 62, 67 (1951).

As this report also notes, absent a procedure such as the CID statutory scheme here, the courts become "an investigatory adjunct to the government" and that the government "cannot pretend to bring charges in order to discover whether actual charges should be brought." Id. at 67. Thus, Tenn. Code Ann. § 8-630 *et seq.* is an expression by the Legislature of how it wishes to pursue any legal claims that the State may have against persons or firms.

[9] Finally, as discussed *infra*, the Congress and several State legislatures have enacted Civil Investigative Demand statutes that authorize the federal and state Attorneys General to conduct pre-complaint, investigatory proceedings. The widespread passage of similar statutes by the federal and state legislatures is surely further evidence that these statutes are in furtherance of the public welfare and a valid exercise of the police power of the State, consistent with the provisions of Art. 11, Sec. 8 of the Tennessee Constitution.

* * * *

IN THE CHANCERY COURT
FOR DAVIDSON COUNTY, TENNESSEE

[Filed May 30, 1979]

No. 79-761-II

STATE OF TENNESSEE ex rel., THOMAS H. SHRIVER,

and

NORMAN M. LIPMAN, PRESIDENT, WINE & SPIRITS WHOLESALERS OF TENNESSEE, INC.,
Plaintiffs,

versus

WILLIAM M. LEECH, JR.,
ATTORNEY GENERAL AND REPORTER,
Defendant.

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S AMENDED MOTION TO DISMISS

HOOKER & WADDEY

KEITH M. LUNDIN
Counsel for Plaintiff Norman M. Lipman, President, Wine & Spirits Wholesalers of Tennessee, Inc.

KING & BALLOW
DANIEL C. KAUFMAN
Of Counsel

• • • •

[22]

D. The Secret, Nonreciprocal Discovery Sought by the Attorney General Violates the Due Process and Equal Protection Clauses of the State and Federal Constitutions

Chapter 646 of the Public Acts of 1976 is unconstitutional under the due process and equal protection clauses of the Tennessee and U.S. Constitutions. The nonreciprocal discovery scheme established by the statute violates the constitutional principles delineated in *Wardius* v. *Oregon*, 412 U.S. 470, 93 S.Ct. 2208 (1973). The argument that pre-complaint, antitrust investigations are "good public policy" cannot save Chapter 646 because the statute is neither an antitrust statute nor a "pre-complaint" procedure, and proof of the public needs that it allegedly serves must await a full hearing of this matter.

T.C.A. §§ 8-630 *et seq.* is not exclusively a pre-complaint investigatory statute. Notwithstanding persistent [23] characterization by the Attorney General, the awesome new civil process created in Chapter 646 presumes to grant the Attorney General nonreciprocal discovery rights at *every* stage of potential or actual litigation involving the State of Tennessee. Section 1 of the statute explicitly comprehends situations: "where the State of Tennessee *is a party litigant or there is reasonable cause to indicate it will be a party litigant.*" T.C.A. § 8-630 (emphasis added). This power to issue process and to conduct secret compulsory discovery is unavailable to any other class of litigants or potential litigants. The statute presumes to allow the Attorney General to ignore the Tennessee Rules of Civil Procedure and the applicable discovery statutes which bind all other litigants.

The grant of extraordinary, nonreciprocal discovery process at the accusatory and adjudicatory stages of litigation is constitutionally impermissible. The United

Stat Supreme Court has established that the due process of law required by the Fourteenth Amendment includes the right to reciprocal discovery. In *Wardius* v. *Oregon*, 412 U.S. 470, 93 S.Ct. 2208 (1973), this principle was applied to overturn an Oregon statute which accorded the State the power to conduct nonreciprocal discovery of alibi witnesses. Noting "the state's inherent information gathering advantages" the Supreme Court held ". . . that in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street." *Wardius, supra*, 412 U.S. at 475, 93 S.Ct. at 2212. *See United States* v. *Myers*, 550 F.2d 1036, 1041 (5th Cir. 1977); *United States* v. *Higginbotham*, 539 F.2d 17 (9th Cir. 1976); *United States ex rel. Hairston* v. *Warden*, 407 F.Supp. 524, 528-529 (N.D. Ill. 1976). Plaintiffs' contention that Tennessee's CID statute fails to comport with the fundamental fairness required by the due process clauses of the Tennessee and United States Constitutions is unrefuted by Defendant's Motion to Dismiss.

[24] The Tennessee statute completely ignores the long-standing and constitutionally significant distinction between the investigatory and accusatory stages of government action. Unlike the investigatory schemes enacted by the federal government and several states, the Tennessee CID statute purports to allow the Attorney General special powers for use in the preparation of pending actions and actions for which there is already reasonable cause. The Supreme Court of the United States has recognized in *Escobedo* v. *Illinois*, 378 U.S. 488, 84 S.Ct. 1758 (1964), and innumerable cases thereafter, that the due process clause of the Fourteenth Amendment demands strict compliance with constitutional guarantees where a government investigation ceases to be a general inquiry and begins to focus. The curious Tennessee CID statute actually requires that the Attorney General focus his investigation and assume an accusatory posture be-

fore the extraordinary civil process is available. The statute requires that the state already be an actual litigant or that the Attorney General have "reasonable cause" to indicate that litigation is at hand. As the court recognized in *People* v. *Anaconda Wire & Cable Co.*, 256 N.Y.S.2d 121, 123 (S. Sup. Ct. 1965) to allow an Attorney General to use CID process for the purpose of "aiding him in the prosecution of the instant action would be grossly unfair and would deprive the defendants of their right to be present at any pre-trial examination or to cross-examine or to obtain a copy of the testimony of the witness."

The purported grant of non-reciprocal compulsory discovery powers at the accusatory stage of government inquiry is unsupported by the law of other jurisdictions. As if consciously avoiding the constitutional deficiency in the Tennessee statute, the United States Congress and numerous state legislatures have limited use of CID process to true investigatory situations. The Federal Antitrust Civil Process Act authorizes issuance of a CID only "prior to the [25] institution of a civil or criminal proceeding . . ." 15 U.S.C. § 1312(a). In Connecticut, the Attorney General has authority to issue a CID only "prior to instituting any action or proceeding" and the purely investigatory, pre-complaint nature of this grant has been confirmed by the Connecticut Courts. *See Mobil Oil Corporation* v. *Killian*, 301 A.2d 562, 565 (Conn. Super. Ct. 1973); CONN. GEN. STAT. § 35-42(a). *See, also*, N.H. REV. STAT. ANN. § 356:10 (". . . before the institution of any court proceedings . . . ,"; LA. REV. STAT. ANN. § 51:143 (". . . before beginning an action under this part . . ."); WASH. REV. CODE § 19.86.110 (". . . prior to the institution of a civil proceeding thereon . . ."); ILL. REV. STAT. Ch. 38 § 60-7.2 (". . . prior to the commencement of any civil or criminal action . . ."); MO. REV. STAT. § 416.091 (". . . prior to the institution of a civil or criminal proceeding thereon, . . .");

ARIZ. REV. STAT. § 44-1406 (". . . before bringing any action . . .").

The Tennessee CID statute is not an antitrust statute and its unreasonableness is not refuted by antitrust public policy arguments. The Attorney General's argument that antitrust investigations are good public policy cannot save Chapter 646 of the Public Acts of 1976. (See Defendant's Memorandum at 7-9). As demonstrated above,* Chapter 646 is not an antitrust statute. Regardless of the policy interests at issue in Title 69 of the Tennessee Code, Chapter 646 unreasonably purports to empower the Attorney General to investigate any matter. Plaintiffs contend that no public policy can justify so broad a grant of inquisitoral powers. The proof of Defendant's argument that this extraordinary power serves the "public interest" must wait trial.

The Tennessee statute favors the State of Tennessee over all other litigants, plaintiffs or defendants. The extraordinary discovery power it grants is a secretive process—no other party to litigation would know of its use. Those knowing of its use would have no right to be present, [26] no right to a transcript of any proceedings, no right to object, to seek counsel, to seek protective orders—no right to due process of law.

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* *See* Section A, *supra*.

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

[Filed Oct. 25, 1979]

No. 79-71-II

STATE OF TENNESSEE ex rel., THOMAS H. SHRIVER,

and

NORMAN M. LIPMAN, PRESIDENT, WINE & SPIRITS WHOLESALERS OF TENNESSEE, INC.,
Plaintiffs-Appellants

vs.

WILLIAM M. LEECH, JR.,
ATTORNEY GENERAL AND REPORTER,
Defendant-Appellee

[On Appeal From the Chancery Court for Davidson County, Tennessee, Part II, No. 79-761-II]

BRIEF OF PLAINTIFFS-APPELLANTS

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• • • •

[21]

C. *Whether the Secret, Non-Reciprocal Discovery Sought by the Attorney General Violates the Due Process and Equal Protection Clauses of the State and Federal Constitutions.*

Chapter 646 of the Public Acts of 1976 is unconstitutional under the due process and equal protection clauses of the Tennessee and U.S. Constitutions. The non-reciprocal discovery scheme established by the statute violates the constitutional principles delineated in *Wardius* v. *Oregon*, 412 U.S. 470, 93 S.Ct. 2208 (1973). The restrictions on the use of evidence gained through a CID announced by the chancellor cannot cure the constitutional defects in the statute.

The awesome new civil process created in Chapter 646 presumes to grant the Attorney General secret non-reciprocal discovery rights at *every* stage of potential or actual litigation involving the State of Tennessee. Section 1 of the statute explicitly comprehends situations: "where the State of Tennessee *is a party litigant or there is reasonable cause to indicate it will be a party litigant.*" T.C.A. § 8-630 (emphasis added). This power to issue process and to conduct secret compulsory discovery is unavailable to any other class of litigants or potential

litigants. The statute allows the Attorney General to ignore the Tennessee Rules of Civil Procedure and the applicable discovery statutes which bind all other litigants. Under Chapter 646 the Attorney General and no other party can require documents and compel testimony under oath without notice to anyone. Plaintiffs claim that the statute unreasonably classifies litigants in violation of Article 11 § 8 of the Tennessee Constitution and the fourteenth amendment to the United States Constitution.

The court below rejected plaintiffs' equal protection claims without analysis.* At this stage there has been no proof whatsoever of the reasonableness [22] of the classification of litigants in Chapter 646. The Tennessee CID statute is not an antitrust statute and its unreasonableness is not refuted by antitrust public policy arguments. The special power granted by Chapter 646 is not limited to use in any particular kind of actual or potential litigation. The Attorney General's argument below that antitrust investigations are good public policy cannot save Chapter 646. Regardless of the policy interests at issue in Title 69 of the Tennessee Code, Chapter 646 unreasonably purports to empower the Attorney General to investigate any matter. Plaintiffs contend that no public policy can justify so broad a grant of inquisitorial powers. The proof of defendant's argument that this extraordinary power serves the "public interest" must wait trial.

The Tennessee statute completely ignores the longstanding and constitutionally significant distinction between the investigatory and accusatory stages of government action. Unlike the investigatory schemes enacted by the

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* The court considered plaintiffs' due process allegations based on *Wardius* v. *Oregon*, 412 U.S. 470, 95 S.Ct. 2208 (1973), but made no mention of the equal protection problem presented by the statute.

federal government and several states, the Tennessee CID statute purports to allow the Attorney General special powers for use in the preparation of pending actions and actions for which there is already reasonable cause. The Supreme Court of the United States has recognized in *Escobedo* v. *Illinois*, 378 U.S. 488, 84 S.Ct. 1758 (1964), and innumerable cases thereafter, that the due process clause of the Fourteenth Amendment demands strict compliance with constitutional guarantees where a government investigation ceases to be a general inquiry and begins to focus. The curious Tennessee CID statute actually requires that the Attorney General focus his investigation and assume an accusatory posture before the extraordinary civil process is available. The statute requires that the state already be an actual litigant or that the Attorney General have "reasonable cause" to indicate that litigation is at hand. As the court recognized in *People* v. *Anaconda Wire & Cable Co.*, 256 N.Y.S.2d 121, 123 (Sup. Ct. 1965), to allow an Attorney General to use CID process for the purpose of aiding in the prosecution of a [23] pending action "would be grossly unfair and would deprive the defendants of their right to be present at any pre-trial examination or to cross-examine or to obtain a copy of the testimony of the witness."

The grant of non-reciprocal discovery process at the accusatory and adjudicatory stages of litigation is constitutionally impermissible. The United States Supreme Court has established that the due process of law required by the Fourteenth Amendment includes the right to reciprocal discovery. In *Wardius* v. *Oregon*, 412 U.S. 470, 93 S.Ct. 2208 (1973), this principle was applied to overturn an Oregon statute which accorded the State the power to conduct non-reciprocal discovery of abili witnesses. Noting the "state's inherent information gathering advantages" the Supreme Court held ". . . that in the absence of a strong showing of state interests

to the contrary, discovery must be a two-way street." *Wardius, supra*, 412 U.S. at 475, 93 S.Ct. at 2212. *See State* v. *Rachal*, 362 So.2d 737, 739-40 (La. 1978). *See also United States* v. *Myers*, 550 F.2d 1036, 1041 (5th Cir. 1977); *United States* v. *Higginbotham*, 539 F.2d 17 (9th Cir. 1976); *United States, ex rel. Hariston* v. *Warden*, 407 F.Supp. 524, 528-529 (N.D. Ill. 1976).

The grant of non-reciprocal compulsory discovery powers at the accusatory stage of government inquiry is unsupported by the laws of other jurisdictions. As if consciously avoiding the constitutional deficiency in the Tennessee statute, the United States Congress and numerous state legislatures have limited use of CID process to true investigatory situations. The Federal Antitrust Civil Process Act authorizes issuance of a CID only "prior to the institution of a civil or criminal proceeding . . ." 15 U.S.C. § 1312(a). In Connecticut, the Attorney General has authority to issue a CID only "prior to instituting any action or proceeding" and the purely investigatory, pre-complaint nature of this grant has been confirmed by the Connecticut courts. *See Mobil Oil Corporation* v. *Killian*, 301 A.2d 562, 565 (Conn. Super. Ct. 1973); CONN. GEN. STAT. § 35-42(a). *See also* N.H. REV. STAT. ANN. [24] § 563:10 (". . . before the institution of any court proceedings . . .,"; LA. REV. STAT. ANN. § 51:143 (". . . before beginning an action under this part . . ."); WASH. REV. CODE § 19.86.110 (". . . prior to the institution of a civil proceeding thereon . . ."); ILL. REV. STAT. Ch. 38 § 60-7.2" (". . . prior to the commencement of any civil or criminal action . . ."); MO. REV. STAT. § 416.091 (". . . prior to the institution of a civil or criminal proceeding thereon, . . ."); ARIZ. REV. STAT. § 44-1406 (". . . before bringing any action . . .").

The Chancellor's holding * that oral testimony obtained pursuant to a CID will only be admissible in court for such purposes as impeachment cannot remedy the equal protection and due process problems presented by the law. The lower court's ruling implicitly recognizes the validity of plaintiffs' equal protection and due process claims, but the court proceeded to amend the statute rather than grant the requested declaratory relief. The holding leaves unaffected the admissibility of documentary and other non-oral evidence acquired pursuant to a CID in violation of the recipient's constitutional rights. The Chancellor's holding does not preclude the Attorney General from acquiring and making use of evidence obtained pursuant to the unconstitutional CID statute so long as he does not seek its admission at a trial.

The Chancellor's observation that the recipient of a CID would have full reciprocal discovery under the Tennessee rules once litigation begins does nothing to remedy the unconstitutional non-reciprocal pre-complaint discovery powers granted by Chapter 646. Moreover, the statute purports to condone secret non-reciprocal discovery by the Attorney General even after the commencement of litigation. Plaintiffs' due process and equal protection claims are claims on which relief can be granted.

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* The Chancellor first held that no evidence obtained pursuant to a CID would be admissible as substantive evidence at trial. (App. at A-50-51). On reconsideration, the Chancellor confined this holding to oral testimony. (App. at A-63).

IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

STATE OF TENNESSEE ex rel., THOMAS H. SHRIVER,

and

NORMAN M. LIPMAN, PRESIDENT,
WINE & SPIRITS WHOLESALERS OF TENN., INC.,
Plaintiffs-Respondents,

v.

WILLIAM M. LEECH, JR.,
ATTORNEY GENERAL & REPORTER,
Defendant-Petitioner.

[On Appeal From the Court of Appeals of Tennessee, Middle Section at Nashville]

APPLICATION FOR AN APPEAL BY PERMISSION

WILLIAM J. HAYNES, JR.
Deputy Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219

Of Counsel:
WILLIAM M. LEECH, JR.
Attorney General

• • • •

[3] QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals' decision, contrary to the decisions of this Court, impermissibly restricts the recognized constitutional power of the Legislature to enact laws to protect the public welfare and to determine the method for enforcement of its laws.

2. Whether the Court of Appeals erred, as a matter of law, that the provisions of Tenn. Code Ann. §§ 8-630—8-636 represent an impermissible exercise of the police power of the Legislature.

3. Whether the Civil Investigative Demand Statutes that grant precomplaint investigatory power to the State through its Attorney General violate the appellee Lipman's state or federal constitutional rights.

4. Whether the Court of Appeals erred, as a matter of law, that the Attorney General in the issuance of the Civil Investigative Demand failed to comply with the provisions of Tenn. Code Ann. § 8-630 *et seq.*

IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

STATE OF TENNESSEE ex rel., THOMAS H. SHRIVER,

and

NORMAN M. LIPMAN, PRESIDENT,
WINE & SPIRITS WHOLESALERS OF TENN., INC.,
Appellees,

v.

WILLIAM M. LEECH, JR.,
ATTORNEY GENERAL & REPORTER,
Appellant.

[On Appeal From the Court of Appeals of Tennessee, Middle Section at Nashville]

BRIEF FOR THE APPELLANT

WILLIAM J. HAYNES, JR.
Deputy Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219

Of Counsel:
WILLIAM M. LEECH, JR.
Attorney General

[1] ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals' decision, contrary to the decisions of this Court, impermissibly restricts the recognized constitutional power of the Legislature to enact laws to protect the public welfare and to determine the method for enforcement of its laws.

2. Whether the Court of Appeals erred, as a matter of law, that the provisions of Tenn. Code Ann. § 8-6-401 *et seq.* represent an impermissible exercise of the police power of the Legislature.

3. Whether the Civil Investigative Demand Statutes that grant precomplaint investigatory power to the State through its Attorney General violate the appellee Lipman's state or federal constitutional rights.

4. Whether the Court of Appeals erred, as a matter of law, that the Attorney General in the issuance of the Civil Investigative Demand failed to comply with the provisions of Tenn. Code Ann. § 8-6-401 *et seq.*

* * * *

[29]

4. *Appellees have no constitutional right to participate in a governmental investigation.*

In this appeal appellees urge that Chapter 646 of the Public Acts of 1976 is unconstitutional under the due process and equal protection clauses of the Tennessee and U.S. Constitution. Appellees claim that the statute unreasonably classifies litigants in violation of Art. 11, § 8 of the Tennessee Constitution and the Fourteenth Amendment to the United States Constitution. (Br. at p. 21). Appellees attack the Chancellor for his alleged failure to make no mention of the equal protection problem presented by the statute. It is interesting to note that appellees cite *no* case law in their brief on the equal pro-

tection issue in the Court below. Moreover, no mention is made in their motion to reconsider that the Chancellor allegedly overlooked the equal protection issue. Under Rule 36 of the Rules of Appellate Procedure, appellees should not be heard now to complain. In any event, the Attorney General submits that the Chancellor was correct in his analysis of the Due Process Clause issue and no Equal Protection Clause violation is raised by the complaint.

Under Art. 11, Sec. 8, appellees assert that the Civil Investigative Demand statutes create an unreasonable classification of litigants in the State courts by conferring a "favored" status upon the State of Tennessee by granting pre-complaint investigatory powers. As stated, any statutory classification [30] scheme that is based upon the exercise of the police power of the State will be upheld if any rational basis exists for the classification. The rational basis for the CID statute has been discussed, *supra*, p. 12-15.

With a rational basis established, the CID statutes cannot be properly characterized as unconstitutional. In *Harrison* v. *Schrader*, 569 S.W.2d at 825 this Court stated in an equal protection case that ". . . if any state of facts can reasonably be conceived to justify the classification or if the reasonableness of the class is fairly debatable, the statute must be upheld. [citation omitted]." *Harrison* v. *Schrader*, 569 S.W.2d 822, 825-26 (Tenn. S.Ct. 1978). In *Harrison* this Court looked to the decision of another court and learned journals and articles that discussed the subject matter of the legislation under attack as indicative of a rational basis for the Act at issue there. *Id.* at 826-27. Here, there is a wealth of supportive decisional law. Further, distinguished panels, including a panel of federal judges, that have considered protracted civil cases, including those involving the government have endorsed the concept of a pre-complaint investigative process.

> It is said that vague complaints in civil antitrust cases brought by the government are unavoidable because the inquisitorial power of the Department of Justice in civil matters is inadequate and the Department's only recourse is to file complaints containing indefinite allegations and thereafter to utilize the processes of the court to discover the facts. It may well be that the powers of investigation of the Department are not sufficient for these tasks and that Congress should be asked to remedy that deficiency, or that ample investigative powers of the Federal Trade Commission should be utilized. The Prettyman Report (Procedure in Antitrust and Other Protracted Cases) 13 F.R.D. 62, 67 (1951).

As this report also notes, absent a procedure such as the CID statutory scheme here, the courts become "an investigatory adjunct to the government" and that the government "cannot pretend to bring charges in order to discover whether [31] actual charges should be brought." *Id.* at 67. Moreover, it is in the public interest that before the State institutes litigation that the State attempt to assure itself that a valid legal claim exists before it imposes the burden of litigation upon persons and firms in the Courts.

Thus, under the decisions of this Court, the Court of Appeals' finding of unconstitutionality is clearly erroneous. *Harrison* v. *Schrader, supra; Ford Motor Corp.* v. *Pace, supra.*

Under federal case law on equal protection issues, it is also a rule of adjudication on the constitutionality of state legislation that the state legislature is presumed to have passed a constitutional state act. *Goldblatt* v. *Town of Hampstead, New York,* 369 U.S. 590, 596 (1962); *McGowan* v. *Maryland,* 366 U.S. 420, 426 (1961); *Metropolitan Casualty Ins. Co. of New York* v.

Brownell, 294 U.S. 580, 584 (1935); *Middleton* v. *Texas Power & Light Co.*, 249 U.S. 152, 157 (1919).

Thus, the Attorney General submits that even with the alleged identifiable classes, such as described by appellees, "[t]he Equal Protection does not mean that a state may not draw lines that treat one class of individuals or entities different from the others. The test is whether the difference in treatment is an *invidious discrimination.*" (Emphasis added). *Lehnhausen* v. *Lake Shore Auto Parts*, 410 U.S. 356, 359 (1973). The assertion of the State's interest in legal matters by a statutory vehicle that is used by federal and state authorities is surely not invidious discrimination within the purview of the Equal Protection Clause. There is no law cited here and clearly no Equal Protection Clause issue has been presented in the complaint or on this appeal.

Contrary to the Court of Appeals' holding, the Due Process Clause has not been viewed by the Courts as a bar to administrative and investigative procedures such as the CID statutory procedure in this case. In *Hannah* v. [32] *Larche*, 363 U.S. 420 (1960), the United States Supreme Court rejected a Due Process argument to the Civil Rights Commission's investigative procedures holding:

> The specific constitutional question, therefore, is whether persons whose conduct is under investigation by a governmental agency of this nature are entitled, by virtue of the Due Process Clause, to know the specific charges that are being investigated, as well as the identify of the complainants [footnote omitted] and to have the right to cross-examine these complainants and other witnesses. *Although these procedures are very desirable in some situations, for the reasons which we shall not indicate, we are of the opinion that they are not constitutionally required in the proceeding of this Commis-*

> *sion.* Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures that have traditionally been associated with the judicial process. *On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Id.* at 441-42. (Emphasis added)

This judicial distinction, for constitutional purposes, between investigatory and adjudicatory proceedings was stated in *In re Groban's Petition*, 352 U.S. 330, 77 S.Ct. 510 (1957), a state fire marshal pursuant to a statute, was conducting an investigation into the cause of a fire. The fire marshal subpoenaed several witnesses to testify, but the witnesses refused to testify unless their counsel were present. The fire marshal treated the refusals as contempt and the fire marshal himself committed the witnesses to the county jail until they decided to testify. On application for habeas corpus, the matter was litigated in the state courts and on appeal to the United States Supreme Court, the Court stated:

> We hold that appellants had no constitutional right to be assisted by counsel in giving testimony *at the investigatory proceeding* conducted by the fire marshal and that section 3737.13, insofar as it authorizes the [33] exclusion of counsel while a witness testifies, is not repugnant to the Due Process Clause of the Fourteenth Amendment. *In re Groban's Petition*, at 333, 514. (Emphasis added).

The Court further stated:

> A witness before a Grand Jury cannot insist as a matter of constitutional right, on being represented

> by his counsel, (footnote omitted) nor can a witness before other investigative bodies (footnote omitted) there is no more reason to allow the presence of counsel before a fire marshal trying in the public interest to determine the cause of a fire. Obviously in these situations evidence obtained may possibly lay witnesses open to criminal charges. When such charges are made in a criminal proceeding, he *then* may demand the presence of his counsel for his defense. *In re Groban's Petition* at 333, 513.
>
> Section 3737.13, which has been in effect since 1900, (footnote omitted) represents a determination by the Ohio legislature that investigations conducted in private may be the most effective method of bringing to light facts concerning the origins of fires, and, in the long run, of reducing injuries and losses from fires caused by negligence or by design. We cannot say that this determination is unreasonable. The presence of advisor to witnesses might easily so far encumber an investigatory proceeding as to make it unworkable or unwieldy. *Id.* at 334.

This holding makes it clear that investigative proceedings are not subject to the full panoply of procedures applicable to criminal proceedings as suggested by appellees.

The Kansas Supreme Court has also dealt with similar claims in a civil investigative demand proceeding by the Kansas Attorney General. In *State ex rel. Londerholm* v. *American Oil Co.*, 446 P.2d 754 (Kan. S.Ct. 1968), the Court considered *inter alia* the question of whether a corporation's employees were entitled to have their counsel present at an investigatory proceeding by the State Attorney General. The Court found no such constitutional right and observed:

> [34] The proceeding is not adversary but is *ex parte*; it is investigative and not adjudicatory. Of

course, facts uncovered through it may lead to an adjudicatory hearing, civil or criminal, the same as information disclosed by any other method of investigation. *That which the corporate appellants are really asserting is the right to be present during the Attorney General's investigation.* The right to an adjudicatory hearing includes the right to counsel. *But we know of no constitutional right in anyone to be present at an investigation simply because his conduct is the subject of the inquiry and he may in the future be prosecuted as a result of information developed during the investigation.* A witness appearing in an inquisition could well be a former employee of a corporation or he could be a person without any business connection with the corporation; in either event, *we know of no right in the corporation to be notified of the proceeding, to appear thereat or to be represented by counsel. It is true, vitally, relevant information concerning violations of our antitrust laws may sometimes be secured only through the testimony of employees or agents of those corporations suspected of irregularities. . . We hold then that at an inquisition held pursuant to K.S.A. 50-153 where an employee is questioned about the possible antitrust law violations by his corporate employer the corporation has no constitutional right to be represented by counsel. Id.* at 757. (Emphasis added).

The Court of Appeals' recognition of some right or constitutional entitlement of appellees to participate by litigation in the Attorney General's statutory decision-making process was without constitutional support and the Chancellor properly rejected it. As stated, a judicial remedy under the CID statutes is available to protect against any possible abuse or illegality.

As to the Due Process Clause, the constitutional requirement of reciprocal discovery, cited by the Court of Appeals, is applicable only in the context of criminal proceedings. The Chancellor, in his Memorandum at p. 10, declared *Wardius* v. *Oregon*, 412 U.S. 470, 43 S.Ct. 2208 (1973), distinguishable from the instant case, but ultimately imposed a constitutional restriction on [35] the use of oral testimony acquired by a CID. For reasons discussed below, the Attorney General submits *Wardius* is totally inapplicable to the CID statutory framework.

In *Wardius* the "fundamental unfairness" found by the Court as violative of the Due Process Clause and unconstitutional was that the criminal defendant was denied access to evidence of the kind that was required by state law to divulge to the prosecution.

Wardius was decided in the context of pending criminal litigation and upon a finding that the state scheme resulted in a fundamental unfairness to the criminal defendants. *Wardius* is therefore distinguishable for several reasons. First, the CID proceeding is *investigative* in nature, *not adjudicative*. Accordingly, the CID, as used in this case, would not be within the purview or spirit of *Wardius* that involved a trial. Second, the Attorney General has no criminal enforcement powers in this matter. Any proceeding brought by the Attorney General as the result of this CID would be civil. No element of personal liberty is threatened by the CID as in a criminal trial. Third, unlike a criminal case, the rules of discovery and the case law thereunder provide a suitable and appropriate device by which appellant may seek to obtain access to information acquired during a civil investigation demand proceeding in any subsequent civil proceeding. In a word, there is a process by which under judicial supervision the appellee can se-

cure any evidence relevant to plaintiff's defenses, if a lawsuit subsequently develops.

Lipman, at any subsequent civil proceeding, will not be deprived of discovery of any evidence, as in *Wardius*, so as to deny them their constitutional right to a fair trial, particularly with the Chancellor's decision to limit the use of CID testimony solely for impeachment. The Attorney General does not except to the Chancellor's decision insofar as the evidentiary limitation is restricted to [36] any oral testimony acquired in a civil investigative demand proceeding. The Attorney General submits that the Chancellor was correct in lifting his initial evidentiary restriction to exclude documents received by CID. Documents that are received by a CID could be subject to discovery requests and the civil rules of discovery in accordance with the case law under judicial supervision.

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IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

No. 80-33-I

STATE OF TENNESSEE ex rel., THOMAS H. SHRIVER,

and

NORMAN M. LIPMAN, PRESIDENT,
WINE & SPIRITS WHOLESALERS OF TENNESSEE, INC.,
Plaintiffs-Appellees,

vs.

WILLIAM M. LEECH, JR.,
ATTORNEY GENERAL AND REPORTER,
Defendant-Appellant.

[Davidson Equity; On Appeal From the Court of Appeals Middle Section, No. 79-71-II]

BRIEF OF APPELLEES

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ORAL ARGUMENT REQUESTED

[1] STATEMENT OF ISSUES *

I. WHETHER THE COURT OF APPEALS CORRECTLY HELD THAT APPELLEES' COMPLAINT STATES CONSTITUTIONAL AND STATUTORY CLAIMS ON WHICH RELIEF CAN BE GRANTED.

A. Whether The Court of Appeals Correctly Held That The Secret, Non-Reciprocal Discovery Demanded By The Attorney General Violates The Due Process And Equal Protection Clauses Of The Tennessee And United States Constitutions.

B. Whether The Court Of Appeals Correctly Determined That Appellees' Complaint States Claims Under The Search And Seizure Clauses Of The Tennessee And United States Constitutions.

C. Whether The Court Of Appeals Correctly Determined That The Attorney General May Not Conduct An Investigation Pursuant To A CID Which Fails To State The Matter Under Investigation And Fails To Identify The Parties To The Inquiry As Required By Law.

D. Whether The Court Of Appeals Correctly Held That The Attorney General Failed To Comply With The Statutory Requirement That A CID Be Issued Personally By The Attorney General.

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* The Appellees submit this statement of issues and the following statements of the case and of the facts pursuant to Rule 27(b) of the Tennessee Rules of Appellate Procedure. Appellees believe that Appellant's statements of these matters are unsatisfactory.

E. Whether The Court Of Appeals Correctly Held That The Attorney General May Not Demand The Creation Of Documents Or The Execution Of Sworn Affidavits.

F. Whether The Court Below Correctly Held That The Statute Allowing The Attorney General To Petition For Contempt Does Not Protect Appellees' Constitutional Rights And Does Not Preclude Appellees From Maintaining This Action.

II. WHETHER THE COURT OF APPEALS ERRONEOUSLY DETERMINED THAT THE ATTORNEY GENERAL FOR THE STATE OF TENNESSEE MAY CONDUCT ANTITRUST INVESTIGATIONS WITHOUT STATUTORY AUTHORITY.

III. WHETHER THE COURT OF APPEALS ERRONEOUSLY UPHELD THE DISMISSAL OF APPELLEES' CLAIMS IN THE NATURE OF QUO WARRANTO.

[8]

A. *The Court Of Appeals Correctly Held That The Secret Non-Reciprocal Discovery Authorized By Chapter 646 Violates The Due Process And Equal Protection Clauses Of The Tennessee And United States Constitutions.*

The Court below properly held Chapter 646 of the Public Acts of 1976 unconstitutional under the due process and equal protection clauses of the Tennessee and U.S. Constitutions.[6] *See* Opinion at 9, 10, 16, 17. The

[6] Curiously, it is claimed in Appellant's brief at Page 29 that Appellees are barred from raising the equal protection issue in this Court by Rule 36, Tennessee Rules of Appellate Procedure. The equal protection question was alleged in Appellees' complaint

secret non-reciprocal discovery scheme established by the statute violates the constitutional principles delineated in *Wardius* v. *Oregon*, 412 U.S. 470, 93 S.Ct. 2208 (1973), and followed by this Court in *Tennessee Department of Human Services* v. *Vaughn*, 595 S.W.2d 62 (Tn. 1980). Appellant's offer to restrict the use of evidence gained through a CID cannot cure the constitutional defects in the statute.

The awesome new process created in Chapter 646 presumes to grant the Attorney General secret, non-reciprocal rights to demand discovery and take testimony at *every* stage of potential or actual litigation involving the State of Tennessee. As the Court below aptly described:

> The present "C.I.D." law does not authorize investigation limited to particular activities which are deemed to involve a special public interest. . . . The present law authorizes investigation of anybody and everybody, anything and everything, which might relate to present or future litigation of the State. Opinion at 17.

[9] Section 1 of the statute explicitly comprehends situations: "where the State of Tennessee *is a party litigant or there is reasonable cause to indicate it will be a party litigant.*" T.C.A. § 8-6-401 (emphasis added). This power to issue process and to conduct secret compulsory discovery is unavailable to any other class of litigants or potential litigants. The statute allows the Attorney General to ignore the Tennessee Rules of Civil Procedure and the applicable discovery statutes which bind all other litigants. Under Chapter 646 the Attorney General and

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but not addressed by the Chancery Court. On appeal, Appellees claimed error and the equal protection question was correctly decided by the Court of Appeals in favor of Appellees' position. *See* Opinion at 9. It is thus the Appellant who now raises this issue in this Court, not Appellee. Appellant's Rule 36 argument mistakes the posture of this case.

no other party can require documents and compel testimony under oath without notice to anyone. The Court below sustained Appellees' claim that the statute unreasonably classifies litigants in violation of Article 11 § 8 of the Tennessee Constitution and the fourteenth amendment to the United States Constitution.

Appellant has not and cannot articulate a constitutionally sufficient justification for the discriminatory classification created by Chapter 646. The decisions of this Court indicate that the Attorney General must at least show that the classification contained in Chapter 646 bears some substantial relationship to the achievement of a legitimate governmental interest. *See Tennessee Department of Human Services* v. *Vaughn*, 595 S.W. 2d 62, 66 (Tn. 1980); *Mitchell* v. *Mitchell*, 594 S.W.2d 699, 701 (Tn. 1980); *Leech* v. *American Booksellers Assn., Inc.*, 582 S.W.2d 738, 755 (Tn. 1979); *Harrison* v. *Schrader*, 569 S.W.2d 822, 825 (Tn. 1978). The only rationale offered by the Attorney General—the "public policy" involved in the enforcement of the antitrust laws —will not support the classification in Chapter 646. The Tennessee CID statute *is not an antitrust statute* and its reasonableness is not refuted by antitrust public policy arguments. The special power granted by Chapter 646 is not limited to use in any particular kind of actual or potential litigation. The Attorney General cannot justify the classification of litigants in Chapter 646 by references to articles and learned treatises on antitrust.[6] The Attorney General's argument [10] that antitrust investigations are good public policy cannot save Chapter 646. Regardless of the policy interests at issue in Title 69 of the Tennessee Code, Chapter 646 unreasonably purports to empower the Attorney General to investigate *any* matter. Appellees contend that no public policy can justify so broad a grant of inquisitorial powers. As

[6] *See* Appellant's brief at 12-15.

the Court stated below, the interest of the State necessary to justify the favored treatment granted by Chapter 646 "is not the interest of the state government in the result of litigation to which it is a party." Opinion at 8.

The Court below correctly held that the Tennessee CID statute violates the due process requirement of reciprocal discovery announced by the Supreme Court in *Wardius* v. *Oregon*, 412 U.S. 470 (1973).[7] The due process requirement of reciprocal discovery cited by the Court of Appeals is not "contrary to the overwhelming case law" as the Attorney General contends; but, quite the contrary, is a recognized component of "the law of the land" provision of Article 11 § 8 of the Constitution of Tennessee. The United States Supreme Court has established that the due process of law required by the fourteenth amendment includes the right to reciprocal discovery. In *Wardius* v. *Oregon*, 412 U.S. 470, 93 S.Ct. 2208 (1973), this principle was applied to overturn an Oregon statute which accorded the State the power to conduct non-reciprocal discovery of alibi witnesses. Noting "the state's inherent information gathering advantages" the Supreme Court held ". . . that in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street." *Wardius, supra*, 412 U.S. at 475, 93 S.Ct. at 2212. *See State* v. *Rachal*, 362 So.2d 737, 739-40 (La. 1978). *See also United States* v. *Myers*, 550 F.2d 1036, 1041 (5th Cir. 1977); *United States* v. *Higginbotham*, 539 F.2d 17 (9th Cir. 1976); *United States, ex rel., Hariston* v. *Warden*, 407 F.Supp. 524, 528-529 (N.D. Ill. 1976).

[11] In February of 1980, this Court applied the same constitutional principle to invalidate a state statute which afforded non-reciprocal discovery rights to one

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[7] Opinion at 8.

party to a paternity action. In *Tennessee Department of Human Services* v. *Vaughn*, 595 S.W.2d 62, 64-65 (Tn. 1980), citing due process and equal protection precedents, this Court declared unconstitutional the "litigant discrimination" contained in T.C.A. § 36-227(1). This statute effectively permitted the putative father in a paternity action to depose the mother but did not accord the mother the same discovery rights against the putative father. Declaring the statute unconstitutional, this Court stated as follows:

> The one enjoys an advantage, the other suffers a detriment. This different treatment of litigants does not comport with "the law of the land."
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> • • • •
>
> Article XI, Section 8 of the Constitution of Tennessee withholds from the Legislature the power "to suspend any general law for the benefit of any particular individual" or "to pass any law for the benefit of individuals inconsistent with the general laws of the land" or "to pass any law granting to any individual or individuals, rights, privileges, immunitie, [immunities] or exemptions other than such as may be, by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law."
>
> This section is closely akin to the "law of the land" proviso. *It demands that all persons—in this case litigants—who are similarly situated or circumstanced, be governed by the same rule of law. The law must embrace and affect alike all persons similarly situated and must make no arbitrary or capricious classification.*
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> *Vaughn, supra*, 595 S.W.2d at 64-5. (emphasis added).

The Court below recognized that the Tennessee CID statute completely ignores the longstanding and constitutionally significant distinction between the investigatory and accusatory stages of government action. Unlike the investigatory schemes enacted by the federal government and several states, the Tennessee CID statute purports to allow the Attorney General special powers [12] for use in the preparation of pending actions and actions for which there is already reasonable cause. The Supreme Court of the United States has recognized in *Escobedo* v. *Illinois*, 378 U.S. 488, 84 S.Ct. 1758 (1964), and innumerable cases thereafter, that the due process clause of the fourteenth amendment demands strict compliance with constitutional guarantees where a government investigation ceases to be a general inquiry and begins to focus. The curious Tennessee CID statute actually requires that the Attorney General focus his investigation and assume an accusatory posture before the extraordinary civil process is available. The statute requires that the state already be an actual litigant or that the Attorney General have "reasonable cause" to indicate that litigation is at hand. As the court recognized in *People* v. *Anaconda Wire & Cable Co.*, 256 N.Y.S.2d 121, 123 (Sup. Ct. 1965), to allow an Attorney General to use CID process for the purpose of aiding in the prosecution of a pending action "would be grossly unfair and would deprive the defendants of their right to be present at any pre-trial examination or to cross-examine or to obtain a copy of the testimony of the witness."

The grant of non-reciprocal compulsory discovery powers at the accusatory stage of government inquiry is unsupported by the laws of other jurisdictions. As if consciously avoiding the constitutional deficiency in the Tennessee statute, the United States Congress and numerous state legislatures have limited use of CID process to true investigatory situations. The Federal Antitrust

Civil Process Act[7a] authorizes issuance of a CID only "prior to the institution of a civil or criminal proceeding . . ." 15 U.S.C. § 1312(a). In Connecticut, the Attorney General has authority to issue a CID only "prior to instituting any action or proceeding" and the purely investigatory, pre-complaint [13] nature of this grant has been confirmed by the Connecticut courts. *See Mobil Oil Corporation* v. *Killian*, 301 A.2d 562, 565 (Conn. Super. Ct. 1973); CONN. GEN. STAT. § 35-42(a) *see also* N.H. REV. ANN. § 356:10 (". . . before the institution of any court proceedings . . ."); LA. REV. STAT. ANN. § 51:143 (". . . before beginning an action under this part . . ."); WASH. REV. CODE § 19.86.110 (". . . prior to the institution of a civil proceeding thereon . . ."); ILL. REV. STAT. Ch. 38 § 60-7.2 (". . . prior to the commencement of any civil or criminal action . . ."); MO. REV. STAT. § 416.091 (". . . prior to the institution of a civil or criminal proceeding thereon, . . ."); ARIZ. REV. STAT. § 44-1406 (". . . before bringing any action . . .").

The Attorney General tacitly admits the CID statute is constitutionally infirm but would have this Court amend the statute to avoid Appellees' claims. At Page 35 of its brief before this Court, Appellant concedes that the CID statute must be amended to exclude the use at trial of testimony taken pursuant to a CID, else the statute fails due process analysis. The Chancery Court reached the same conclusion.[8] Appellees agree that the CID statute fails constitutional scrutiny but contend that the Court of Appeals fashioned the appropriate remedy—the Court below declared the statute unconsti-

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[7a] A copy of the Federal Antitrust Civil Process Act is appended to this brief.

[8] The Chancellor first held that no evidence obtained pursuant to a CID would be admissible as substantive evidence at trial. On reconsideration, the Chancellor confined this holding to oral testimony.

tutional; the Court refused Appellant's offer to rewrite the statute to avoid the constitutional error.

The statutory amendment proposed by Appellant cannot remedy the equal protection and due process problems presented by the law. Appellant's suggested evidentiary exclusion would leave unaffected the admissibility of [14] documentary and other non-oral evidence acquired pursuant to a CID in violation of the recipient's constitutional rights. Such a scheme would not preclude the Attorney General from acquiring and making use of evidence obtained pursuant to an unconstitutional CID so long as he does not seek its admission at a trial. The Court of Appeals correctly rejected Appellant's argument.

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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE ex rel., THOMAS H. SHRIVER,

and

NORMAN M. LIPMAN, PRESIDENT, WINE & SPIRITS WHOLESALERS OF TENN., INC.,
Appellees,

v.

WILLIAM M. LEECH, JR.,
ATTORNEY GENERAL & REPORTER,
Appellant.

[On Appeal from the Court of Appeals of Tennessee, Middle Section at Nashville]

REPLY BRIEF ON BEHALF OF THE APPELLANT

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* * * *

[3]

B. PRE-COMPLAINT INVESTIGATORY PROCEEDINGS HAVE BEEN ACCEPTED AS RATIONAL AND CONSISTENT WITH DUE PROCESS

The Appellees' arguments on equal protection and due process grounds present no legally justifiable reasons to sustain the Court of Appeals holding. On the equal protection issue, the Appellees, for the first time, cite au-

thorities in support of their contention that this CID process impermissibly discriminates between "litigants." This contention is particularly inappropriate to the circumstances of this case. The Attorney General did not issue the CID in the context of any *litigation*, but rather as part of an *investigation*. Thus, the portion of the CID statute which affects litigation is not presented by the facts of this case. There is no discrimination between "litigants" in this case.

In *Tennessee Department of Human Services* v. *Vaughn*, 595 S.W.2d 62 (Tenn. S.Ct. 1980), cited by Appellees, the statutory procedure at issue was in the context of litigation and involved the availability of a specific type of evidence in an adjudicatory proceeding. There is no question presented here that any evidence procured pursuant to a CID has been admitted or excluded in any proceeding to the prejudice of a party. The equal protection principle stated in *Vaughn* applies here, but the factual setting in *Vaughn* is not the same as here.

[4] It is clearly rational for the Legislature to grant its chief legal officer the power to subpoena persons and documents in any investigation of violations of the law. The federal and foreign state courts have uniformly so held. See Attorney General's brief, pp. 13-14. With a rational basis established under case law, no impermissible discrimination on equal protection exists as to the CID statute as it relates to investigations of matters in which the State may be a party. As will be discussed on the due process issue, *infra*, Tenn. Code Ann. § 8-6-401, as it relates to pending litigation, imposes no unfair burden on the adversary party.

As to the "rationale" for the CID statutes, the Attorney General does not rely solely upon antitrust law as ground for upholding the statute. The "rationale" is simply that the public interest is well served if the State

has a process by which it can ascertain before litigation whether there are indeed facts to support a State claim or violation of the law so as to avoid unnecessary burdens upon the Courts and its citizens and corporations by protracted and costly litigation in any of several subject matters. Violations of the antitrust laws are the subject matter of this CID. This case is clearly a matter involving an important public interest in which the Attorney General is clearly mandated and authorized to enforce. Antitrust is merely an example of the sound and wise public policy reflected by the CID statutes.

In closing on the equal protection issue, whether the confirmation of this power by the Legislature upon the Attorney General is in the public interest is a matter to be addressed by the Legislature in the first instance. *Chapdelaine* v. *Tennessee Board of Examiners of Land Surveyors*, 541 S.W.2d 786, 787 (Tenn. S.Ct. 1976). The Legislature has answered the question in the affirmative. Although the Legislative action is not conclusive on the courts, this Court grants [5] deference to such a decision. The judicial precedents in the federal and foreign state jurisdiction cited by the Attorney General clearly indicate that this type of procedure is constitutionally permissible. This Court in deciding equal protection issues, has looked to such precedents and learned treatises to find an adequate basis upon which to declare statutes constitutional. *Harrison* v. *Schrader*, 569 S.W.2d 822 (Tenn. S.Ct. 1977).

As to the due process issue, Appellees fail to recognize the constitutional distinction between the due process requirement in an adjudication, criminal or civil, and a civil investigative proceeding. See Attorney General's Brief, pp. 31-5. Even if one were to reject this legal distinction, there is no "secret discovery" process here. The situation that Appellees suggest or hypothesize could happen under the CID statutes in the context of litiga-

tion, is not the inevitable result in the operation of these CID statutes.

Although the State submits that the party litigant phrase of § 8-6-401 is not factually at issue here, an examination of this code section will not reveal any unconstitutional scheme. First, in the event a CID is used in pending litigation, the rules of civil discovery would apply to accord the State's adversary party the opportunity to discover the State's use of the CID and any State evidence, documentary or oral, acquired by a CID or the identity of witnesses and documents upon which the State relies. The adversary party, by the Rules of Civil Procedure, would have ample opportunity to examine these witnesses and documents prior to trial. The presiding court could well impose discovery deadlines upon all parties and limit the Attorney General in his use of the CID statutes and impose other disclosure requirements on the parties. Under current trial practices, the parties must disclose the names of witnesses and documents upon which they will rely prior to trial. See, *e.g.*, Rules of Chancery Court of Davidson County, Rule 22 I, a and b.

[6] This situation is factually and legally a *far* cry from the *Wardius* v. *Oregon* decision relied upon by the Appellees. If a statute can be construed in a manner to cure any possible constitutional problems, Tennessee courts have done so.

The mere fact that a state statute must be construed does not render the statute unconstitutional.

* * * *

Office-Supreme Court, U.S.
FILED
AUG 3 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-2173

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NORMAN M. LIPMAN, President,
Licensed Beverage Wholesalers of Tennessee, Inc.,
Petitioner,

v.

WILLIAM M. LEECH, JR.,
Attorney General & Reporter,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Tennessee

BRIEF FOR RESPONDENT IN OPPOSITION

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June 23, 1981

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTION PRESENTED

Whether Tennessee's Civil Investigative Demand Statutes that grant precomplaint investigatory authority to the State Attorney General to subpoena information relating to violations of state and/or federal laws and that require judicial approval to compel compliance therewith, violate the Equal Protection Clause and/or Due Process Clause of the Fourteenth Amendment to the United States Constitution.

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Statute Involved	2
Constitutional Provisions Involved	2
Statement of the Case	2
Argument	6
I. Reasons for Denying the Writ	6
A. The Decision Below is Clearly Correct	6
1. The Tennessee Supreme Court correctly applied the existing federal case law that rejects petitioner's constitutional challenges	6
2. The Due Process Clause of the Fourteenth Amendment does not grant an individual or company the constitutional right to participate in a governmental investigative proceeding	7
3. The holding in *Wardius* v. *Oregon* involved a criminal trial and does not apply to a civil administrative investigatory proceeding that requires judicial approval to compel compliance	10

4. The Tennessee Legislature created a permissible legislative scheme, consistent with the Equal Protection Clause, to investigate violations of its laws 12

B. No Compelling Reasons Exist to Warrant Review by This Court 15

Conclusion 18

Appendices A-1,A-3

TABLE OF AUTHORITIES

Cases

Atlantic Richfield Co. v. FTC, 398 F.Supp. 1 (S.D. Tex. 1975) 17

Commonwealth of Kentucky ex rel. Hancock v. Pineur, 533 S.W.2d 527 (Ky. S.Ct. 1976) 13

Escobedo v. Illinois, 378 U.S. 478 (1964) 8

FTC v. St. Regis Paper Co., 304 F.2d 731 (7th Cir. 1962) 16

Genuine Parts Company v. FTC, 445 F.2d 1382, 1388 (5th Cir. 1971) 7,8

Gold Bond Stamp Co. v. United States, 325 F.2d 1018 (8th Cir. 1974), *aff'g.* Petition of Gold Bond Stamp Co., 221 F.Supp. 391 (D.C. Minn. 1963) ... 13

Goldblatt v. Town of Hampstead, New York, 369 U.S. 590 (1962) 12

Hannah v. Larche, 363 U.S. 420, 80 S.Ct. 1502 (1960) .. 7,8

Hyster Co. v. United States, 338 F.2d 183 (9th Cir. 1964) 13

In re Application of Hirschorn, 402 N.Y. Supp. 520 (N.Y. S.Ct. 1978) 13

In re Groban's Petition, 352 U.S. 330, 77 S.Ct. 510 (1957) 8

Lehnhausen v. Lake Shore Auto Parts, 410 U.S. 356 (1973) 13

Lewandowski v. Danforth, 547 S.W.2d 470 (Mo. S.Ct. 1977) 13,15

Lightning Rod Manufacturers, Ass'n. v. Staal, 339 F.2d 346 (7th Cir. 1964) 13

Material Handling Institute, Inc. v. McLaren, 426 F.2d (3d Cir. 1970), *cert. denied*, 400 U.S. 826 (1970) ... 13

McGowan v. Maryland, 366 U.S. 420 (1961) 12

Metropolitan Casualty Ins. Co. of N.Y. v. Brownell, 294 U.S. 580 (1934) 12

Middleton v. Texas Power & Light Co., 249 U.S. 152 (1919) 12

Mobil Oil Corp. v. Killian, Attorney General, 301 A.2d 562 (Conn. Sup. Ct. 1973) 14

Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 66 S.Ct. 494 (1946) 6,13

People v. Crawford Dist. Co., 291 N.E.2d 648 (Ill. S.Ct. 1972) 14

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) 13

S.E.C. v. Brigadon Scotch Dist. Co., 480 F.2d 1047 (2d Cir. 1973) *cert. denied*, 415 U.S. 915 (1974) ... 17

State ex rel. Londerholm v. American Oil Co., 446 P.2d 754 (Kan. S.Ct. 1968) 10

Steele v. State of Washington ex rel. Gorton, Attorney General, 537 P.2d 782 (Wash. 1975) 14

United States v. Morton Salt Co., 338 U.S. 632 (1950) .. 13

Wardius v. Oregon, 412 U.S. 470, 43 S.Ct. 2208 (1973) . 6,10

Constitutional Provisions

United States Constitution, Fourteenth Amendment ... 2,6

Tennessee Statutes and Rules

Tenn. Code Ann. § 8-6-401 3,4,12

Tenn. Code Ann. § 8-6-402..... 2

Tenn. Code Ann. § 8-6-405..... 16

Tenn. Code Ann. § 8-6-407..... 17

Tenn. Code Ann. § 10-7-504(d) 17

Rule 11(a), Tenn. R. App. Pr. 5

Rule 13(a), Tenn. R. App. Pr. 4

Rule 36, Tenn. R. App. Pr. 12

Other Authorities

Prettyman Report, The, 13 F.R.D. 62 (1951)..... 14

Report of the Attorney General's National Commission to Study Antitrust Laws, 343-44 (1955) 14

No. 80-2173

IN THE

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OCTOBER TERM, 1980

NORMAN M. LIPMAN, President,
Licensed Beverage Wholesalers of Tennessee, Inc.,
Petitioner,

v.

WILLIAM M. LEECH, JR.,
Attorney General & Reporter,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Tennessee

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Tennessee is reported at 612 S.W.2d 454 (1981) and reprinted in the Petitioner's Appendix at pp. 1a-15a. The opinion of the Court of Appeals of Tennessee and the final judgments and opinions issued by the Chancery Court of Davidson County reviewed by the Tennessee Supreme Court below are unreported. They are reprinted in the Petitioner's Appendix at pp. 16a-56a.

JURISDICTION

The opinion of the Supreme Court of Tennessee was rendered on February 2, 1981, and the judgment of that Court was

entered on the same date. Thereafter, Petitioner's petition for rehearing was denied on March 9, 1981. An application for extention of time to file this petition was filed on June 3, 1981 and granted by Justice Stewart by Order of that same date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3). This Brief in Opposition is submitted within the time provided by Rule 24(1) of the 1970 Revised Rules of the Supreme Court.

STATUTE INVOLVED

The Civil Investigative Demand Statutes, Tenn. Code Ann. § 8-6-101 *et seq.* at issue are listed in the Petitioner's Appendix at pp. 14a-15a.

CONSTITUTIONAL PROVISIONS INVOLVED

The part of Section 1 of the Fourteenth Amendment to the Constitution of the United States at issue is:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On February 19, 1979, the Attorney General, by his Deputy, issued a Civil Investigative Demand to Norman M. Lipman (hereinafter called "Lipman"), President, Licensed Beverage Wholesalers of Tennessee, Inc. (hereinafter called "LBWT") (App. 69a). The Civil Investigative Demand (hereinafter cited as "CID") was issued pursuant to Tenn. Code Ann. § 8-6-402 and commanded Lipman to appear before the Attorney General's designated representative on March 20, 1979, at 10:00 a.m., and to bring with him certain documents and records of the LBWT

that were listed and demanded in the Attachment No. 2 to the Civil Investigative Demand (App. p. 81a-84a). By certified mail, Lipman received supplemental instructions on compliance with the Civil Investigate Demand from the Attorney General by his Deputy on May 2, 1979. The supplemental instructions were prompted by inquiries from persons upon whom CIDs had been served and were intended to alleviate "any undue burdens" for compliance with the CID (App. p. 85a-87a). At the request of LBWT, by its attorneys, the Attorney General by his Deputy, answered several questions relative to the CID that was served upon Lipman, but did not identify the parties to the investigation or comment upon the details of the investigation (R. 25-30). After several extentions of time for compliance, Lipman filed his action in the Chancery Court of Davidson County.

This civil action was instituted by Thomas A. Shriver, District Attorney General and Lipman, as a declaratory judgment and *quo warranto* action in the Chancery Court of Davidson County. Thomas A. Shriver has not joined in this petition. The complaint was a full scale attack on the constitutionality of the provisions of Tenn. Code Ann. § 8-6-401 *et seq.*, under which the Attorney General had issued the CID to Lipman. Lipman also alleged the Attorney General did not comply with the CID statutes. Upon Lipman's application for a temporary restraining order, the Attorney General & Reporter was restrained from issuing, executing and enforcing the Civil Investigate Demand Statutes.

The matter came before the Chancellor on June 1, 1979, upon the Attorney General's Motion to Dismiss, and twenty days later the Chancellor rendered a nineteen-page memorandum of law in which he dismissed the complaint.[1] Upon motions to

[1] Appendix pp. 42a-56a.

reconsider, the Chancellor rendered a second memorandum.[2] Final Judgment[3] was entered on July 25, 1979, from which the appeal to the Court of Appeals was lodged.

On appeal to the Tennessee Court of Appeals, Lipman raised constitutional and *quo warranto* issues as well as issues relative to the construction of the Civil Investigative Demand Statutes and the Attorney General's compliance therewith. The Attorney General & Reporter, under Rule 13(a) of the Rules of Appellate Procedure, also presented for review a statutory construction issue as to the Chancellor's holding that the Attorney General must establish administrative probable cause at any CID enforcement hearing.

On March 28, 1980, the Court of Appeals rendered its decision[4] and declared the Civil Investigative Demand Statutes, Tenn. Code Ann. § 8-6-401 *et seq.* unconstitutional, but affirmed the dismissal of the *quo warranto* claim against the Attorney General. In its reversal of the Judgment of the Chancellor, the Court of Appeals' decision apparently was founded on three legal theories. First, the Court suggested that the Civil Investigative Demand statutes are an excessive grant of power by the General Assembly to the Attorney General. Second, the Court found that the CID Statutes violated the Due Process Clause of the Fourteenth Amendment by the absence of reciprocal discovery; and the Equal Protection Clause and Article I, Section 17 of the Tennessee Constitution by its grant of a favored status for "pretrial discovery" by the State.

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[2] Appendix pp. 38a-41a.

[3] Appendix pp. 35a-37a.

[4] Appendix at 16a-34a.

Upon application of the Attorney General,[5] the Supreme Court accepted the Court of Appeals' decision for review. As will be discussed in more detail *infra*, the Supreme Court found that neither the Fourth Amendment nor the Equal Protection Clause to the United States Constitution nor the Due Process Clause of the Fourteenth Amendment was violated by the CID statutes because the applicable decisions of this Court and lower federal courts supported a finding of constitutionality.[6] Further, the Tennessee Supreme Court scrutinized the CID statutes and related court rules and found no fundamental unfairness in the CID process. The Court's opinion on the CID at issue states that the CID statutes had not been complied with because (1) the CID was not issued by the Attorney General himself; (2) the names of the parties to the expected litigation were not mentioned; and (3) the matter under investigation was not described with sufficient particularity.[7] It is noteworthy that the Attorney General submitted to each Court, since the initial decision of the Chancellor, that he would take no enforcement action as to the CID at issue in this case.[8]

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[5] *See* Rule 11(a) of the Tennessee Rules of Appellate Procedure.

[6] Appendix at 6a-11a.

[7] Appendix at 2a.

[8] Appendix A to this Brief in Opposition.

ARGUMENT

I. REASONS FOR DENYING THE WRIT

A. The Decision Below is Clearly Correct

1. The Tennessee Supreme Court Correctly Applied The Existing Federal Case Law That Rejects Petitioner's Constitutional Challenges

Petitioner's basic insistence in this petition is that so much of the decision of the Tennessee Supreme Court on certain constitutional issues raised by the attack on CID statutes is contrary to the decisions of this Honorable Court that interpret the requirements of the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution. Petition at pp. 15, 23. A review of the opinion of the Tennessee Supreme Court clearly shows that this Honorable Court's precedents were relied upon in resolving the Petitioner's claims under the Fourteenth Amendment. As to Petitioner's due process argument, the Tennessee Supreme Court recognized this Court's holding in *Wardius* v. *Oregon*, 412 U.S. 470 (1973), and considered its application to this CID statute. Upon such analysis, the Tennessee Supreme Court stated, for reasons that will be more fully discussed *infra*, that, "We are of the opinion the CID statutes comport with the fundamental fairness requirement voiced in *Wardius, supra*." App. at 7a. The Court also relied upon this Honorable Court's opinions that "... the CID is an investigatory proceeding, not an adjudicatory proceeding, as in *Wardius, supra*," App. at 7a.

The Tennessee Supreme Court also cited this Honorable Court's opinion in *Oklahoma Press Publishing Company* v. *Walling*, 327 U.S. 108, 210 (1946), that, "The purpose of an investigatory proceeding 'is to discover and produce evidence, not to prove a pending charge or complaint, but upon which to make one if, in the [agency's] judgment, the facts thus discovered should justify doing so." App. at 7a.

As to Petitioner's contention with regard to his and LBWT's alleged constitutional right to participate in a government enforcement proceeding, the Tennessee Supreme Court applied the principle of *Hannah* v. *Larche,* 363 U.S. 420 (1960), and quoted the principle of law expressed by the Court of Appeals for the Fifth Circuit in *Genuine Parts Company* v. *FTC,* 445 F.2d 1382, 1388 (5th Cir. 1971), that

> A party under investigation may not contest the discovery and production of evidence in the same manner he may contest the use of that evidence in an adjudication by proper objection, by the introduction of other evidence, and the other safeguards traditional to an adversary proceeding under our system. An investigation does not determine guilt or innocence; that is done at the adjudication, and thus it is there the whole plethora of due process rights designed to ensure the fairness of such a determination come to bear.

Accordingly, the Attorney General submits that there is no conflict between the Tennessee Supreme Court decision and the holding of this Honorable Court and the lower federal courts on the constitutional issues raised by this petition. As will be discussed in more detail *infra,* the Tennessee Supreme Court correctly decided the constitutional issues below and no state-federal conflict exists that warrants further review of the Tennessee Supreme Court's decision by this Honorable Court.

2. The Due Process Clause Of The Fourteenth Amendment Does Not Grant An Individual Or Company The Constitutional Right To Participate In A Governmental Investigative Proceeding

The Tennessee Supreme Court's holding on the due process issues raised below in clear accord with this Honorable Court's holding that the Due Process Clause does not create any individual or corporate rights to participate in administrative and

investigative procedures such as the CID statutory procedure in this case. In *Hannah* v. *Larche*, 363 U.S. 420 (1960), this Court rejected a strikingly similar Due Process argument that challenged the Civil Rights Commission's investigative procedures and held:

> The specific constitutional question, therefore, is whether persons whose conduct is under investigation by a governmental agency of this nature are entitled, by virtue of the Due Process Clause, to know the specific charges that are being investigated, as well as the identify of the complainants [footnote omitted] and to have the right to cross-examine these complainants and other witnesses. *Although these procedures are very desirable in some situations, for the reasons which we shall not indicate, we are of the opinion that they are not constitutionally required in the proceeding of this Commission.* Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures that have traditionally been associated with the judicial process. *On the other hand, when governmental action does not partake of an adjudication, as for example, when a general factfinding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used. Id.* at 441-42. (Emphasis added)

The Tennessee Supreme Court relied upon the Fifth Circuit Court of Appeals' holding on the precise argument made here at Petition, p. 20, that any attempt to graft "the principle of [*Escobedo* v. *Illinois*, 378 U.S. 478 (1964)] into the field of administrative law [was] without merit." *Genuine Parts Co.* v. *FTC*, 445 F.2d 1382, 1387 (5th Cir. 1971).

This judicial distinction, for constitutional purposes, between investigatory and adjudicatory proceedings was also stated by this Honorable Court in *In re Groban's Petition*, 352 U.S. 330,

(1957), where a state fire marshal pursuant to a statute, was conducting an investigation into the cause of a fire. The fire marshal subpoenaed several witnesses to testify, but the witnesses refused to testify unless their counsel were present. The fire marshal treated the refusals as contempt and the fire marshal himself committed the witnesses to the county jail until they decided to testify. On application for habeas corpus, the matter was litigated in the state courts and on appeal to the United States Supreme Court, the Court stated:

> We hold that appellants had no constitutional right to be assisted by counsel in giving testimony *at the investigatory proceeding* conducted by the fire marshal and that section 3737.13, insofar as it authorizes the exclusion of counsel while a witness testifies, is not repugnant to the Due Process Clause of the Fourteenth Amendment. *In re Groban's Petition,* at 335, 514. (Emphasis added).

The Court further stated:

> A witness before a Grand Jury cannot insist as a matter of constitutional right, on being represented by his counsel, (footnote omitted) nor can a witness before other investigative bodies (footnote omitted) there is no more reason to allow the presence of counsel before a fire marshal trying in the public interest to determine the cause of a fire. Obviously in these situations evidence obtained may possibly lay witnesses open to criminal charges. When such charges are made in a criminal proceeding, he *then* may demand the presence of his counsel for his defense. *In re Groban's Petition* at 333, 513.
>
> Section 3737.13, which has been in effect since 1909, (footnote omitted) represents a determination by the Ohio legislature that investigations conducted in private may be the most effective method of bringing to light facts concerning the origins of fires, and, in the long run, of reducing injuries and losses from fires caused by negligence or by

> design. We cannot say that this determination is unreasonable. The presence of advisor to witnesses might easily so far encumber an investigatory proceeding as to make it unworkable or unwieldy. *Id.* at 334.

This holding makes it clear that investigative proceedings are not subject to the full panoply of procedures applicable to criminal proceedings as suggested by Lipman. The Kansas Supreme Court has also dealt with similar claims in a civil investigative demand proceeding by the Kansas Attorney General. *State ex rel. Londerholm* v. *American Oil Co.*, 446 P.2d 754, 757 (Kan. S.Ct. 1968), the Court considered and rejected *inter alia* the contentions that a corporation was entitled to have its counsel present at an investigatory proceeding by the State Attorney General.

In sum, Lipman's argument that he, LBWT and their counsel have a constitutional right to participate in the State's civil investigation is without constitutional support and the Tennessee Supreme Court properly rejected it.

3. The Holding In *Wardius* v. *Oregon* Involved A Criminal Trial And Does Not Apply To A Civil Administrative Investigatory Proceeding That Requires Judicial Approval To Compel Compliance

The constitutional requirement of reciprocal discovery, cited by the Petitioner, is applicable only in the context of criminal proceedings with no discovery available to the criminal defendant. The Tennessee Supreme Court, in its opinion, declared *Wardius* v. *Oregon*, 412 U.S. 470, (1973), distinguishable from the instant case. App. at 7a. It is noteworthy that the Chancellor at the trial court imposed a restriction that oral testimony acquired by a CID could be used for such purposes as impeachment. App. at 5a. The Attorney General did not appeal that restriction. For these reasons more fully discussed below, the Attorney General submits Wardius is totally inapplicable to the CID statutory framework.

In *Wardius* the "fundamental unfairness" found by the Court as violative of the Due Process Clause and unconstitutional was that the criminal defendant was denied access to any evidence of the kind that he was required by Oregon law to divulge to the prosecution. The defendant in *Wardius* could not review the names of the State's alibi rebuttal witnesses and his alibi witness' testimony was stricken. 412 U.S. at 473. *Wardius* was decided in the context of pending criminal litigation and upon a finding that the state scheme resulted in a fundamental unfairness to the criminal defendants.

Wardius is therefore distinguishable for several reasons. First, the Tennessee CID proceeding at issue is *investigative* in nature, *not adjudicative.* Accordingly, the CID, as used in this case, would not be within the purview or spirit of *Wardius* that involved a trial. Second, the Attorney General has no criminal enforcement powers in this matter. Any proceeding brought by the Attorney General as the result of this CID would be civil. The civil rules of discovery would apply. Unlike this Oregon statute, the Tennessee Rules of Civil Procedure have virtually identially discovery provisions as in the Federal Rules of Civil Procedure. These discovery rules and the case law thereunder provide a suitable and appropriate device by which Lipman and/or LBWT may seek to obtain access to information acquired during a civil investigative demand proceeding in any subsequent civil proceeding. Lipman, if named as a party at any subsequent civil proceeding, will not be deprived of discovery of all evidence, as in *Wardius,* so as to deny him his constitutional right to a fair trial, particularly with the Chancellor's decision to limit the use of CID testimony for impeachment. The identity of persons who testified by CID and documents that are received by a CID could be subject to discovery requests under the civil rules of discovery in accordance with the case law and under judicial supervision.

In sum, no cognizable due process rights violations were alleged in the courts below. Lipman's assertions that under the

Due Process Clause of the Fourteenth Amendment he, LBWT and their counsel have some unspecified right to an opportunity to conduct discovery in an ongoing state investigation into law violations are clearly without merit.

4. The Tennessee Legislature Created A Permissible Legislative Scheme, Consistent With The Equal Protection Clause, To Investigate Violations Of Its Laws

In his petition, Lipman urges that the Tennessee CID statutes, Tenn. Code Ann. § 8-6-401 *et seq.* are unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The essence of Lipman's claim is that the CID statutes unreasonably classified litigants to give the State a favored status. It is interesting to note that Lipman cited *no* case law in his brief in the trial court on this equal protection issue. Moreover, no citation to any law was made in his Court of Appeals brief that an equal protection issue. Under Rule 36 of the Tennessee Rules of Appellate Procedure, the Attorney General argued in the Tennessee Supreme Court that Lipman should not be heard not to complain on the equal protection issue. In any event, the Attorney General submits that the Tennessee Supreme Court and the Chancellor were correct in the analysis of the equal protection agrument.

Under federal case law on equal protection issues, it is also a rule of adjudication on the constitutionality of state legislation that the state legislature is presumed to have passed a constitutional state act. *Goldblatt* v. *Town of Hampstead, New York,* 369 U.S. 590, 596 (1962); *McGowan* v. *Maryland,* 366 U.S. 420, 426 (1961); *Metropolitan Casualty Ins. Co. of New York* v. *Brownell,* 294 U.S. 580, 584 (1935); *Middleton* v. *Texas Power & Light Co.,* 249 U.S. 152, 157 (1919).

In *Middleton* v. *Texas Power and Light Co.,* 249 U.S. 152, 159 (1919), this Court observed:

> There is a strong presumption that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds.

Clearly, an Equal Protection Clause violation is only presented "by laws that are invidiously discriminatory - only by classifications that are wholly arbitrary and capricious." *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 60 (1973). (Concurring Opinion of J. Stewart). Thus, the Attorney General submits that even with the alleged identifiable classes, such as described by Lipman, "[t]he Equal Protection does not mean that a state may not draw lines that treat one class of individuals or entities different from the others. The test is whether the difference in treatment is an *invidious discrimination*." (Emphasis added). *Lehnhausen* v. *Lake Shore Auto Parts*, 410 U.S. 356, 359 (1973).

In addition to the legal presumption accorded these statutes, the enactment of similar laws and the judicial confirmation of those statutes in the federal and state courts demonstrate the rational basis of this CID statute. *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950) (Federal Trade Commission); *Oklahoma Press Publishing Company* v. *Walling*, 327 U.S. 186, 204-06 (1946) (Administrator of the Wage and Hour Division); *Material Handling Institute, Inc.* v. *McLaren*, 426 F.2d (3d Cir. 1970), *cert. denied*, 400 U.S. 826 (1970) (United States Attorney General); *Lightning Rod Manufacturers' Assn.* v. *Staal*, 339 F.2d 346 (7th Cir 1964); *Hyster Co.* v. *United States*, 338 F.2d 183 (9th Cir. 1964); *Gold Bond Stamp Co.* v. *United States*, 325 F.2d 1018 (8th Cir. 1974), *aff'g Petition for Gold Bond Stamp Co.*, 221 F.Supp. 391 (D.C. Minn. 1963); *In re Application of Hirschorn*, 402 N.Y.Supp.2d 520 (N.Y.S.Ct. 1978)(State Attorney General); *Lewandowski* v. *Danforth*, 547 S.W.2d 470 (Mo. S.Ct. 1977)(State Attorney General); *Commonwealth ex rel. Hancock* v. *Pineur*, 533 S.W.2d 527 (Ky. S.Ct. 1976)(State

Attorney General); *Steele* v. *State of Washington ex rel. Gorton, Attorney General,* 537 P.2d (Wash. S.Ct. 1975); *Mobil Oil Corp.* v. *Killian, Attorney General,* 301 A.2d 562 (Conn. Superior Ct. 1973); *People* v. *Crawford Distributing Co.,* 291 N.E.2d 648 (Ill. S.Ct. 1972). Other legal authorities have endorsed in relatively recent times the concept of a pre-complaint investigative proceeding. *See The Prettyman Report* (Procedures in Antitrust and Other Protracted Cases), 13 F.R.D. 62, 67 (1951); *Report of the Attorney General's National Commission to Study the Antitrust Laws,* 343-44 (1955). The Prettyman Report was prepared by a panel of federal judges who observed that:

> It is said that vague complaints in civil antitrust cases brought by the government are unavoidable because the inquisitorial power of the Department of Justice in civil matters is inadequate and the Department's only recourse is to file complaints containing indefinite allegations and thereafter to utilize the processes of the court to discover the facts. It may well be that the powers of investigation of the Department are not sufficient for these tasks and that Congress should be asked to remedy that deficiency, or that ample investigative powers of the Federal Trade Commission should be utilized. The Prettyman Report (Procedure in Antitrust and Other Protracted Cases) 13 F.R.D. 62, 67 (1951).

As this report also notes, absent a procedure such as the CID statutory scheme here, the courts become "an investigatory adjunct to the government" and that the government "cannot pretend to bring charges in order to discover whether actual charges should be brought." *Id.* at 67. It is in the public interest that before the State institutes litigation that the State attempt to assure itself that its suit has a valid basis before it imposes the burden of litigation upon persons, firms and the Courts.

These authorities illustrate that the passage of investigatory statutes has a rational basis. Thus, under the dcecisions of this Court, no equal protection violation is presented.

B. No Compelling Reasons Exist To Warrant Review By This Court

None of the Petitioner's arguments that the CID statutes are unfair or create an impermissible favored status for the State have merit. First, Petitioner argues the CID process is unfair because testimony may be taken by CID and "There is no opportunity to cross examine or make appropriate objection." The Chancellor held that CID testimony cannot be used as direct evidence, but may be used for limited purposes such as impeachment. Thus, if any litigation is brought the witness who has testified pursuant to a CID must be produced at the trial in order to present his testimony. Petitioner may have the opportunity to depose the witness. At such a trial or deposition there would be a meaningful "opportunity to cross examine or make appropriate objections" as to any of his testimony. The trial judge would rule on the admissibility of such evidence: such a scheme is not unfair.

Second, Petitioner claims that the CID process gives him or LBWT "no way of protecting trade secret information in the hands of the witness." As a factual matter, the record indicates that the State has evidenced a willingness to consider any protective measure that petitioner suggest with regard to any information that LBWT deems to be trade secret. *See* App. at 94a. As a general proposition, courts have found such a trade secret objection to be premature in a CID investigative proceeding. In *Lewandowski* v. *Danforth, Attorney General,* 547 S.W.2d 470 (Mo. S.Ct. 1977), the Missouri Supreme Court, in upholding the validity of a similar Missouri CID statute, observed on a similar trade secret argument that:

> Appellants finally assert that they should not be compelled to disclose certain information in response to the CID because such information constitutes trade secrets. The assertion is premature. And may be made at such time the Attorney General seeks to present such information before any court. *Id.* at 473.

In the federal system, courts have conditioned enforcement of administrative subpoenas on agency assurance of protective measures for trade secrets. *See FTC* v. *St. Regis Paper Co.*, 304 F.2d 731, 732, n. 1 (7th Cir. 1962). Lipman has not asserted any need for protection of any alleged trade secret information of LBWT and he can make no such claim on behalf of any company or person who is not associated with LBWT.

Lipman and LBWT also assert that the CID provides "no way of ... asserting any privilege with the witness may be unwilling or unable to interpose or of which the witness may be ignorant." Lipman has made no claim of any personal privilege. The complaint charges that the statute on its face violated the right against self-incrimination. Thus, it is not certain whether there is any factual basis for this contention in this case. To the extent that such a privilege issue would arise, the Tennessee Supreme Court pointed out:

> The privilege against self-incrimination necessarily limits statutory procedures, whether or not such limitation is included in the statute, and a judicial procedure under which the subpoena party can invoke the privilege is provided in the CID statutes. T.C.A. § 8-6-405. 612 S.W.2d at 459.

Tennessee statutory scheme clearly indicates that any issue of privilege should be determined by the Court. Of course, petitioner has asserted no privilege with regard to any of the information requested in the CID at issue in this case, and he, or course, cannot assert the privilege of others. To the extent that there may any problem with privilege, the real prejudice occurs at its introduction of such evidence at trial, which is a matter

that the court will decide. Prior to that time it is an area for discovery. The facts of this case, however, suggest that this petitioner has been fully advised as to any and all legal and constitutional privileges available to him.

It is further argued that in the CID proceeding there is no avenue to protect a witness from annoyance, embarrassment, oppression, undue burden or expense. The Attorney General submitted a construction of the CID statute in accord with the federal civil investigative demand that would require judicial intervention in the presentation of specific proof of abuse or harrassment. *See* Appendix B hereto. Federal courts have limited enforcement of administrative subpoena on grounds of undue burdensomeness. *S.E.C.* v. *Brigadon Scotch Dist. Co.*, 480 F.2d 1047, 1056 (2d Cir. 1973), *cert denied*, 415 U.S. 915 (1974).

Finally, it is suggested that the CID permits the State Attorney General "to engage in, compelled secret discovery in his preparation for trial." The Attorney General can only request information under the Tennessee CID statute. It is the state trial court alone, not the Attorney General, who can actually order or compel testimony or documents to be given pursuant to a civil investigative demand. Once litigation is commenced, it would also be for the court to determine whether any information acquired by CID falls within the scope of § 8-6-407 or §10-7-504(d) that accords confidential status for information in the Attorney General's office relating to pending or contemplated litigation. Moreover, the issuance of an administrative subpoena during pending litigation has not been found to be constitutionally impermissible. *See Atlantic Richfield Co.* v. *FTC*, 398 F.Supp. 1, 15 (S.D. Tex. 1975)("the FTC may conduct investigations simultaneously"). In any event, as the Tennessee Supreme Court states, the civil rules of discovery protect against unfairness and the "advantage, if any, conferred upon the State." App. at 7a.

In sum, the Petitioner's arguments are contrary to the case law, do not accurately describe the CID process, and lack compelling legal and factual support.

CONCLUSION

The Attorney General prays that the Petition for Writ of Certiorari to review the decision of the Tennessee Supreme Court be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A TO THE RESPONDENT'S BRIEF IN OPPOSITION

Norman Lipman v. *William M. Leech, Jr.*

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

State of Tennessee *ex rel.*,
Thomas H. Shriver,
and
Norman M. Lipman, President,
Wine & Spirits
Wholesalers of
Tenn., Inc.,
Appellees,

v.

William M. Leech, Jr.,
Attorney General &
Reporter,
Appellant.

[On Appeal From the Court of Appeals of Tennessee,
Middle Section at Nashville]

BRIEF FOR THE APPELLANT

WILLIAM J. HAYNES, JR.
Deputy Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219

OF COUNSEL:
WILLIAM M. LEECH, JR.
Attorney General

* * * * *

[40] ... result in substantial intrustions upon individual privacy. It is clearly understandable why the Courts held such matters to be personal to the Attorney General. *Coolidge* v. *New Hampshire,* 403 U.S. 450 (1971), and *Johnson* v. *United States,* 333 U.S. 10 (1948), are criminal cases. Here the proceeding is civil in nature and are not covert or surreptitous. The CID here is a written instrument that seeks corporate documents and permits the withholding of privileged documents. Moreover, here the CID remains subject to judicial review and no prejudice is suffered by appellees in this respect. The failure of the Attorney General personally to sign the CID does not render the CID constitutionally infirm.

As to the sufficiency of the description of the conduct under investigation, the Attorney General's non-enforcement representation on this and similar worded CIDs to the Court below and here should render this issue moot. In any event, appellee Lipman suffered no prejudice in that he could present this issue at the judicial enforcement hearing under Section 8-6-404. In those instances where state statutes have required that the Civil investigative Demand or subpoena to state the nature of the conduct involved, the courts consistently have recognized that any statement of the conduct must be general in nature. In *Petition of Gold Bond Stamp Co.,* 221 F.Supp. 191 (D. Minn. 1963), *aff'd,* 325 F.2d 1018 (8th Cir. 1964), the Court stated on the federal CID statute:

> To one acquainted with the nature of the trading stamp business, it may appear that the summarized statement as to the nature of the demand is too vague and too brief to be sufficiently informative of the scope and nature of the investigation. The task, however, must be whether the statement in the demand as to the nature of the conduct under investigation is sufficient to inform adequately the person being investigated and sufficient to determine the relevancy of the documents demanded for inspection. *Id.* at 397.

* * * * *

APPENDIX B TO THE RESPONDENT'S BRIEF IN OPPOSITION

NORMAN LIPMAN v. *WILLIAM M. LEECH, JR.*

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

State of Tennessee ex rel.,
Thomas H. Shriver,

and

Norman M. Lipman, President,
Wine & Spirits
Wholesalers of
Tenn., Inc.,
Appellees,

v.

William M. Leech, Jr.,
Attorney General &
Reporter,
Appellant.

[On Appeal From the Court of Appeals of Tennessee,
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BRIEF FOR THE APPELLANT

WILLIAM J. HAYNES, JR.
Deputy Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219

OF COUNSEL:
WILLIAM M. LEECH, JR.
Attorney General

* * * * *

[55] ... No allegations of abuse or harassment were alleged in the complaint and none of the exhibits thereto indicate any such activity. Absent clear and cogent proof of abusive action by the Attorney General to rebut this legal presumption, the CID should be enforced by the Courts.

The Attorney General submits that under the case law the following is the appropriate method of judicial review of Civil Investigative Demands issued pursuant to Tenn. Code Ann. § 8-6-401 *et seq.*, where there has been a failure of the witness to comply with a Civil Investigative Demand. First, as required by the statute, the Attorney General must certify to the Court that there has been a failure to comply. Under the legal presumption in Tennessee that a public official follows the law, the issuance of the CID itself would satisfy the legal requirement that the Attorney General has made the determination that "there is reasonable cause to indicate" that the State of Tennessee will be a party to litigation. This legal presumption, as expressed in the Tennessee cases and federal and state decisions cited, *supra,* would shift the burden of proof to the CID recipient to show why he failed to comply with the Civil Investigative Demand. As discussed, *supra,* in a civil contempt proceeding it is perfectly permissible to defend non-compliance upon the grounds that process was erroneously issued. Appellees could then present any specific evidence of abuse or harassment. If, upon conclusion of the defense, the Attorney General presented nothing to overcome any such proof, the Attorney General would run the risk of a court refusal to enforce a CID. See *Commonwealth of Kentucky ex rel. Hancock* v. *Pineur,* 533 S.W.2d 527, 530 (Ky. Sup.Ct. 1976). This procedure is in accord with the method of judicial review contemplated by the statute; would make the Civil Investigative Demand statutes meaningful and operative; and provide ample judicial protection against abuse. The Attorney General prays the Court to modify the Chancellor's judgment in this sole instance to the extent outlined herein.